IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 159.

WILLIS D. WILLIAMS AND AZEL WILLIAMS,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

In Error to the District Court of the United States for the District of Indiana.
(27246.)

BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

February 17, 1919, a Federal grand jury for the District of Indiana returned an indictment against Willis D. Williams and Azel Williams, now plaintiffs in error, and Harry Hudson, which contained four counts. (R. 1-5.) The first three of these counts charged that said defendants on three different dates in September, 1918, unlawfully caused certain intoxicating liquors to-wit: (a quantity of whiskey varying in amount in each of three counts) "to be trans-

ported in interstate commerce from Cincinnati, in the State of Ohio, into the State of Indiana, the laws of which latter State then and there prohibited the manufacture or sale therein of intoxicating liquors for beverage purposes, and said intoxicating liquors not being so transported for scientific, sacramental, medicinal or mechanical purposes; contrary," etc. The fourth count charged a conspiracy under Sec. 37 of the criminal code to commit the substantive offenses charged in the first three counts of the indictment.

The indictment therefore was based solely upon that portion of Sec. 5 of the act of March 3, 1917, chapter 162, 39 St. at L. 1069, as amended, commonly called The Reed Amendment, which provides so far as material to this case that "whoever shall * * * cause intoxicating liquors to be transported in interstate commerce * * * into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished * * *."

The act provides that punishment for first offense shall be a fine of not more than $1,000.00 or imprisonment of not more than six months.

Plaintiffs in error separately and severally demurred to each count of this indictment (R. 5-8), objecting particularily to its sufficiency in certain separate and several respects—

(a) By virtue of the use of the disjunctive "or"' it did not aver with sufficient certainty that the manufacture of intoxicating liquors was prohibited by Indiana, nor that the sale of liquors for beverage purposes was prohibited by Indiana.

(b) The indictment did not state whom it was defend-

ants caused to transport the liquor nor that the name of that person was unknown.

(c) There was a misjoinder of misdemeanors in the first three counts with a felony in the fourth count.

(d) The indictment following the words of the statute charged the causing of something to be done, to-wit, transportation, which was not itself made unlawful.

(e) The Reed Amendment is null and void because it was without the authority of the Constitution of the United States and in violation of the Constitution of the United States, particularly Clause 6 of Section 9 of Article I of said Constitution, which is to the effect:

> No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

This demurrer was overruled and exceptions were duly taken. (R. 8.) Thereafter (R. 9) Harry Hudson pleaded guilty, and ten days later, April 25, 1919, the day he testified against these plaintiffs in error, Harry Hudson was released on his own recognizance in the sum of $100.00 (R. 9) and the plaintiffs in error were put on trial and found guilty. No judgment appears of record in this case against Hudson.

Harry Hudson, a codefendant, was the first witness called by the prosecution. (R. 40.) On direct examination he testified he commenced working for the defendant, Willis D. Williams, about September 10 or 12, 1918, as chauffeur of a taxi. Mr. Williams, about September 20, 1918, told Hudson to go to a point in Indianapolis, and wait for him with the big car, and he would come out there. Hudson went there and waited and followed Williams to Cincinnati.

Hudson being in one car and Williams in another. They left their cars at the Government Square Garage in Cincinnati and went to the Peoples' wholesale liquor and grocery house. Hudson remained outside; Mr. Williams went inside. Then they drove to Peoples' barn, where they loaded 18 cases of whiskey in the car Hudson was driving and 17 cases in the car Williams was driving. Mr. Williams said he was going back to Indianapolis with the whiskey. Both of them came from Cincinnati with the whiskey. When the witness was three miles from Indianapolis, he drove into a vacant lot where Williams had told him to wait for Azel. Azel is one of the defendants. After waiting there about one and one-half hours Azel came out to this lot, took witness' car and witness drove the car Azel brought out back to the city. Witness does not know what became of the whiskey. This was witness' first trip to Cincinnati. Williams paid him $12.50 on pay day for this trip. Willis D. Williams sent him on the second trip with Wright and Tribby, two other drivers for the taxi company. He gave them a slip of paper and told them to go to the Peoples' Company in Cincinnati and get this whiskey and tell them whom it was for. Each of these started with a car. Tribby broke down at Harrison, Ohio, and was late getting in. Williams told witness to see Mr. Davies in charge of a department of the Peoples' store. Witness told Mr. Davies what was on the paper and Davies said go down there and your whiskey will be there. Witness went to same barn of Peoples where Williams and he had gone before. Hudson, Wright and Tribby all drove down to the barn. Witness brought back 16 or 17 cases; Wright hauled about 16 cases. Mr. Williams told witness to take this whiskey to a place on

Raymond street which Azel that morning had pointed out to the witness. Witness delivered the whiskey there. Wright and Tribby were behind witness returning from Cincinnati.

Three or four days after the second trip, Williams sent witness and Tribby to Cincinnati for whiskey. Williams said he would overtake them, but did not meet them until they reached Cincinnati. Witness, Wright and Williams each loaded whiskey in their cars at Peoples' barn. Witness started back, stopped by a woods, heard a noise, and Azel backed out with his machine. Witness did not know Azel was to meet him. This was a mile from where Azel had met him before. No one halted witness there. Azel did not have his lights on. Azel and witness exchanged cars. Witness does not know what became of the whiskey.

About October 3, Williams sent witness and Wright to Cincinnati again for whiskey, which they got at the Peoples' barn. On witness' return to Indianapolis he was arrested. Williams got him out on bond. Witness told the police and testified in police court he was taking the whiskey to Westville, Illinois, which was a story that had been prearranged by Williams and the drivers. Witness went over to Westville, Illinois, to see Jack Tierney, to see whether he would claim the whiskey; Williams did not go along nor send him over. Williams said he had been over to see Tierney and he was iron clad. Witness saw Tierney in Westville and in the court room here. When Tierney came to Indianapolis, witness went to see him at the Oneida hotel without Williams telling him to do so. Williams did not go to the hotel to see Tierney.

Witness was paid $12.50 for each trip, arrived at by

taking 25% of $50.00, which was the charge for taking a passenger to Cincinnati, Ohio. Witness did not collect any money from anybody for these trips when he hauled whiskey. Azel did not make any trip to Cincinnati with witness at any time. Witness does not know of any other drivers at Williams taxi line hauling whiskey from Cincinnati about September or October and never heard Williams say anything about any other boys hauling for him.

On cross-examination Harry Hudson testified (R. 45):

> Question: "You say you went to Cincinnati other times than the ones you went for Mr. Williams. You have been to Cincinnati and brought liquor back when you did not go for Mr. Williams, haven't you?"
>
> Question by Witness to Court: "Do I have to answer that question?"
>
> The Court: "Yes."

Then the witness testified (R. 46) he had made trips to Cincinnati and brought back liquor three or four times when he did not go for Mr. Williams. He knows Nick Burdeck and Aleck Olteen, and admitted hauling liquor for Nick Burdeck but denied hauling for Aleck Olteen. He used Nick Burdeck's car and did not tell the Government Square Garage it was Pete Williams' car. The load of whiskey which was captured by the police was in Mr. Williams' car, belonged to Mr. Williams, and did not belong to Nick. Witness testified in police court that an Italian asked him what he would charge to take him to Cincinnati to get his wife and sister, and take them to Terre Haute, Indiana, and that witness told him he would do it for fifty dollars; that on reaching Cincinnati this Italian stranger wanted him to haul some whiskey back to Terre Haute, Indiana; that witness refused; then witness agreed to take

it over to Westville, Illinois; that Williams did not know anything about the whiskey, and had nothing to do with it. Williams also testified there that he had nothing to do with the whiskey. Witness was not discharged from Williams' employ after the police court hearing. He hauled liquors for other people after he had police court trial. It was not arranged that he could go where he pleased just so he turned in 75% of the proceeds. $2.50 per hour is what the prices were to be. Witness could make trips any place if he got the money for it and had authority to do so without going back to the office.

Witness has not been arrested on any cases for hauling for Nick Burdeck. Does not know how many times he hauled for Nick Burdeck. He got the liquor for Nick Burdeck at Wolfs' and Peoples' both.

On redirect examination, Harry Hudson testified (R. 47): He was to deliver the load of whiskey for which he was arrested in police court to Raymond street, where he delivered his second load. He worked off and on for Williams as an extra after his arrest in police court. December 16 Mr. Williams brought witness over to his trial here and promised to get a lawyer. Williams took him over to police court.

On recross-examination witness stated the liquor he took to Raymond street was not for Burdeck, but was delivered to a strange foreigner.

Sanford Tribby, a witness called by the prosecution, testified that he worked for Williams in September and October. That he did not at Mr. Williams' directions or order ever make any trips outside this city for the purpose of hauling whiskey for him. One time Mr. Williams or

the desk man told witness to take an Overland car to Government Square Garage at Cincinnati, Ohio. Hudson left the same morning, saying he was going to Cincinnati. Witness' car broke down at Harrison, Ohio. After temporarily fixing the car he arrived at the Government Square Garage, and there met Harry Hudson.

Hudson's car was setting by the filling station on the curb; saw a car there which looked like Wright's car, and asked if he was there. Wright is a driver for Mr. Williams. Thought he saw one of Williams's cars there. Witness walked with Hudson, out to Hudson's car, and some man who looked like a foreigner was paying for his gasoline. Hudson asked witness to go with him to the warehouse. Witness told Hudson he would have to call Pete Williams and tell him he could not get parts for his car and ask him what he was down there for. Hudson says, "Don't mention seeing me." Telephoned one time from Postal telegraph office and one time from the Peoples, reversing charges. Someone at Williams' place said he could reverse charges from Peoples'. Williams said he would bring some parts, which he did, but they did not fit. Witness does not know what became of this car. Witness came back to Indianapolis with Mr. Williams. Witness does not know where Hudson went; the place he went to looked like a warehouse. It had a big gate. Witness does not know whether it was Peoples' or not. Did not see Hudson after that afternoon.

On cross-examination the witness testified that he did not know who was with Hudson. He got in that car after paying for the gasoline, and they went to the warehouse. Witness does not know what happened at Peoples'. This was the only time witness ever saw Hudson in Cincinnati. Witness has never seen a car with wire wheels around the

Williams Auto Company. Witness, though he looked in back end of Mr. Williams' car, returning from Cincinnati with Mr. Williams, did not see any whiskey. Witness does not remember Mr. Williams telling him he was taking the car witness drove to Cincinnati to get it fixed up to trade for a funeral car.

On redirect examination, witness admitted signing a statement but did not understand the statement to say he was to meet Harry Hudson at Cincinnati, as he was not to meet him there. The statement was read to him, and he said it was correct.

Carrol Du Bois called by the prosecution testified:

He was night manager of the Government Square Garage in September and October of last fall. During that time Mr. Williams had come into the garage a good many times. Drivers were there who said they were working for Pete Williams. One time Mr. Williams asked where Peoples' warehouse was. Witness told him he did not know. He said he had drivers coming over there, and witness asked what the drivers were coming over for, and he said they would like to take a little over. (R. 52.)

On cross-examination the witness testified he did not know when this conversation occurred, whether in October or November, but it was after Williams had come in and bought Mr. Rutledge's Oldsmobile roadster.

John H. Schmidt testified for the prosecution that he was receiving clerk for Peoples'. Willis D. Williams, defendant, was in the office of Joseph R. Peoples' Sons in October. Once after that witness saw him passing out. Witness saw him only these two times. Peoples are grocery and liquor dealers. (R. 54.)

Le Roy Weaver testified for the prosecution that he was

shipping clerk for Joseph R. Peoples' company, a wholesale liquor house and grocery company, in Cincinnati, Ohio, last September and October. Previous to last December witness has seen defendant, Willis D. Williams, at the Peoples' company, but had no dealings with him. (R. 54.)

Mrs. Flora Hudson testified for the prosecution that she was mother of the defendant, Harry Hudson. She went to the garage to see if Mr. Williams would get Harry out on bond. He said if Harry had not gone to sleep he would not have got arrested; that he would never have Harry make another trip for him. (R. 55.)

The prosecution rested.

Carrol Du Bois testified for the defense that he is same person who testified for the prosecution; that in September or October someone had been representing himself as the defendant at witness' garage. He gave his name as Williams. Witness does not know who this was, but it was not the defendant. That man had been to witness' garage four or five times. He was usually alone. This man was representing himself as Mr. Williams previous to the buying of the Oldsmobile. (R. 55-60.)

On cross-examination the witness stated the conversation related in his testimony for the prosecution was with the defendant, Willis D. Williams.

On redirect examination, witness testified he had never seen Mr. W. D. Williams until he bought the Oldsmobile roadster; at that time witness told him there was another man representing himself as Pete Williams, hauling liquor, and was not making any secret of it. Then the next time he came down he asked where Peoples was. About the holidays, Mr. Williams asked witness to get the numbers of any cars of any people who came there representing themselves

as drivers of Pete Williams of Indianapolis. Harry Hudson never represented to the witness that he was working for Pete Williams and driving a car for Pete Williams. At one time numbers of two cars, driven by Hudson, were taken. They had wire wheels. They were charged up to Williams. On this occasion a foreigner was in the rear car. Tribby was not the person with Hudson. Williams has cars in storage in witness' garage which he said he was buying and selling.'

This concluded all the evidence.

At the close of all the evidence and before commencement of the argument to the jury, plaintiffs in error, in accordance with the rules of the trial court, separately and severally requested the trial court, in writing, to give each of 19 separate and several instructions. (R. 60-61.)

Some of these requested instructions were peremptory and raised the question of the sufficiency of the facts to warrant a submission of the case to the jury by counts, and as to the whole indictment as to each defendant. Others of these requested instructions asked for a directed verdict because of the unconstitutionality of the Reed Amendment and other defects in the indictment referred to in the demurrer of plaintiffs in error. And still others requested particular instructions on certain points of law. These instructions will be set forth in full in the specifications of error.

During the argument the prosecution nolled the fourth count of the indictment. (R. 63.)

Then the court gave his instructions to the jury (R. 63-65), which included requested instructions No. 15, but did not include any other requested instruction. Requested in-

structions 4 and 8 asked a particular ruling as to count 4, which was nolled.

The court thereupon refused each of the said separate and several requests, except requested instructions numbered 4, 8, 15, of each of these plaintiffs in error, and granted to each of them separate and several exceptions to each ruling. (R. 65-69.)

Thereupon within due time plaintiffs in error filed their separate and several motions for a new trial (R. 9-15), based upon alleged errors of the court in overruling their separate demurrers; insufficiency of evidence to sustain a verdict of guilty, in general and in following particulars as to each count:

The witness, Harry Hudson, a confessed accomplice, is not corroborated.

That there is no evidence that the intoxicating liquor charged to have been caused to be transported in interstate commerce in that count was caused to be transported for other than scientific, sacramental, medicinal, or mechanical purposes.

That there is no evidence that these defendants, or either of them, caused the intoxicating liquor to be transported in interstate commerce, which said count charges that they caused to be transported.

Also errors in refusing the various instructions tendered by plaintiffs in error, which motion was overruled by the court and separate exceptions taken by each plaintiff in error. (R. 18.)

Plaintiffs in error duly filed their separate motion in arrest of judgment (R. 15-17), repeating substantially the same objections to the indictment and cause of action as

were raised in their demurrer, which motion in arrest was overruled by the court and separate and several exceptions thereto were taken by plaintiffs in error. (R. 18.)

Thereafter judgment was entered (R. 18) and thereafter a petition for a writ of error, accompanied by separate assignments of error, were filed (R. 18-36) by each plaintiff in error, which writ of error was allowed and bail fixed and given. R. 36-38.) (For writ of error, see R. 70; citation R. 71; pracipe for record, R. 72-74; clerks certificate R. 74.)

The bill of exceptions containing all the evidence, instructions requested, given, and refused, and exceptions thereto, was duly filed (R. 38), with judge's certificate thereto (R. 70), in due time in accordance with the certificate thereto and several extensions. (R. 15 and 18.)

Jurisdiction of this court is invoked directly under Section 238 of the judicial code as amended because the constitutionality of the act of Congress commonly called the Reed Amendment is drawn in question by the rulings of the District Court on demurrer (R. 5-8), requested instructions (R. 63, No. 14), motion for new trial (R. 10A; R. 14Z) and motion in arrest of judgment (R. 17), respectively, which rulings of the District Court sustained the constitutionality of said act, and errors thereon are assigned in the separate assignments of error of each plaintiff in error, being their respective assignments of error I, XI, XIV and XV. (R. 19-36.)

SPECIFICATIONS OF ERRORS.

The separate assignments of error of plaintiffs in error appear in full at pages 19-36 of the printed record. They will be summarized here.

Assignment Number I of each plaintiff in error is that the trial court erred in overruling their separate demurrer in this, to-wit:

1. Each of said counts of said indictment is void for uncertainty, in that each of said counts fails to set forth with a sufficient and reasonable certainty that the manufacture of intoxicating liquors for beverage purposes was prohibited by the laws of the State of Indiana at the time of the transportation alleged in each of the said counts.

2. Each of said counts of said indictment is void for uncertainty, in that each of said counts fails to set forth with a sufficient and reasonable certainty that the sale of intoxicating liquors for beverage purposes was prohibited by the laws of the State of Indiana at the time of the transportation alleged in each of said counts.

3. Each of said counts of said indictment is void for uncertainty and does not reasonably apprise this defendant of the nature of the accusation against him, in that each of said counts fails to set forth whom it was defendant caused to do the transporting alleged in each of said counts, and each of said counts does not set forth and allege that the name of that person whom it is charged defendant caused to do the transporting alleged in each of said counts is unknown to the grand jurors who returned and found the indictment in the above entitled cause.

4. Each of said counts in said indictment is void because the act charged to have been caused to be done by said defendant, to-wit, the transportation alleged in each of said counts, is not itself made unlawful or criminal by any law of the United States.

5. Each of said counts purports to charge statutory

misdemeanors, and the fourth count of said indictment purports to charge a felony. Each of said first, second and third counts of said indictment is, therefore, void, because joined in the said indictment with the fourth count thereof.

6. Each of said counts of said indictment is null and void because the portion of Section 5 of the act of March 3, 1917, Chapter 162, 39th Statute at Large, page 1069, as amended, which provides in substance that

> Whoever shall * * * cause intoxicating liquors to be transported in interstate commerce * * * into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished

is null and void, because said act of Congress is without the authority of the Constitution of the United States and is in violation of the Constitution of the United States, particularly Clause 6 of Section 9 of Article I of said Constitution, which is to the effect,

> No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

Each of said counts of said indictment is drafted and drawn under the aforesaid portion of said act of Congress and under no other act of Congress.

7. Each of said counts of said indictment is not sufficient in law to constitute an offense against the United States.

Assignments of Error, II, III, IV and V, of each plaintiff in error are predicated upon error of trial court in refusing to give each of the hereinafter set forth requested peremp-

tory instructions to the jury separately and severally requested by each plaintiff in error.

Willis D. Wiliams' Assignment of Error II is based on refusal of the trial court to give his requested instruction No. 1, which was in words and figures as follows:

> You are instructed to return for Willis D. Williams a verdict of not guilty of the charges contained in Count One of the indictment in this cause.

Willis D. Williams' Assignment of Error III is based on refusal of the trial court to give his requested instruction No. 2, which was in words and figures as follows:

> You are instructed to return for Willis D. Williams a verdict of not guilty of the charges contained in Count Two of the indictment in this cause.

Willis D. Williams' Assignment of Error IV is based on refusal of the trial court to give his requested instruction No. 3, which was in words and figures as follows:

> You are instructed to return for Willis D. Williams a verdict of not guilty of the charges contained in Count Three of the indictment in this cause.

Willis D. Williams' Assignment of Error V is based on refusal of the trial court to give his requested instruction No. 18, which was in words and figures as follows:

> You are instructed to return for Willis D. Williams a verdict of not guilty on the charges contained in the indictment in this cause.

Azel Williams' Assignment of Error II is based on refusal of the trial court to give his requested instruction No. 5, which was in words and figures as follows:

> You are instructed to return for Azel Williams a

verdict of not guilty of the charges contained in Count One of the indictment in this cause.

Azel Williams' Assignment of Error III is based on refusal of the trial court to give his requested instruction No. 6, which was in words and figures as follows:

> You are instructed to return for Azel Williams a verdict of not guilty of the charges contained in Count Two of the indictment in this cause.

Azel Williams' Assignment of Error IV is based on refusal of the trial court to give his requested instruction No. 7, which was in words and figures as follows:

> You are instructed to return for Azel Williams a verdict of not guilty of the charges contained in Count Three of the indictment in this cause.

Azel Williams Assignment of Error V is based on refusal of the trial court to give his requested instruction No. 19, which was in words and figures as follows:

> You are instructed to return for Azel Williams a verdict of not guilty on the charges contained in the indictment in this cause.

The grounds stated in assignments of errors Numbers II, III, IV, V, of each plaintiff in error as to why the trial court erred is the following:

> There was no evidence upon which a verdict of guilty could be sustained for each of the following reasons:
>
> a. The witness, Harry Hudson, a confessed accomplice, was not corroborated.
>
> b. There is no evidence that the intoxicating liquor charged to have been caused to be transported in interstate commerce was caused to be transported

for other than scientific, sacramental, medicinal or mechanical purposes.

c. There is no evidence that this defendant caused intoxicating liquors to be transported in interstate commerce.

The remaining assignments of error of each plaintiff in error, omitting the recital of exceptions taken are as follows:

VI.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 9, to the defendant's prejudice, which instruction was as follows:

> You are instructed to return a verdict of not guilty for each of the defendants, Willis D. Williams and Azel Williams, for the reason that the indictment in this cause is void for uncertainty, in that it fails to set forth with a sufficient and reasonable certainty that the manufacture of intoxicating liquors for beverage purposes was prohibited by the laws of the State of Indiana at the time of the acts charged in the said indictment.

VII.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 10, to the defendant's prejudice, which instruction was as follows:

> You are instructed to return a verdict of not guilty for each of the defendants, Willis D. Williams and Azel Williams, for the reason that the indictment in this cause is void for uncertainty, in that it fails to set forth with a sufficient and reasonable certainty that the sale of intoxicating liquors for beverage purposes was prohibited by the laws of the State of

Indiana at the time of the acts charged in said indictment.

VIII.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 11, to the defendant's prejudice, which instruction was as follows:

> You are instructed to return a verdict of not guilty for each of the defendants, Willis D. Williams and Azel Williams, for the reason that the indictment in said cause is void for uncertainty and does not reasonably apprise each of said defendants of the nature of the accusation against each of them, in that said indictment fails to set forth whom it was defendants conspired to cause and caused to do the transporting alleged in said indictment, and for the reason that said indictment does not set forth that the name of that person was unknown to the grand jurors who returned and found the indictment in this cause.

IX.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 12, to the defendant's prejudice which instructions was as follows:

> You are instructed to return a verdict of not guilty for each of the defendants, Willis D. Williams and Azel Williams, for the reason that the act, commonly known as the Reed Amendment, under which this indictment is returned and this prosecution had, does not make the transportation of intoxicating liquor unlawful, but merely makes the causing of such transportation unlawful, and therefore the said act of Congress does not properly and sufficiently describe a criminal offense.

X.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 13, to the defendant's prejudice, which instruction was as follows:

> You are instructed to return a verdict of not guilty for each of the defendants, Willis D. Williams and Azel Williams, for the reason that the first, second and third counts of the indictment in this cause charge misdemeanors and they are joined with the fourth count of the indictment which charges a felony.

XI.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 14, to the defendant's prejudice, which instructions was as follows:

> You are instructed to return a verdict of not guilty for each of the defendants, Willis D. Williams and Azel Williams, for the reason that this indictment and prosecution is founded upon a portion of Section 5 of the act of Congress of March 3, 1917, commonly known as the Reed Amendment, which said act of Congress is null and void because said act of Congress is without the authority of the Constitution of the United States and is in violation of the Constitution of the United States, particularly Clause 6 of Section 9 of Article I of said Constitution, which is to the effect:
>
> No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

XII.

The trial court erred in refusing to give to the jury this

defendant's requested instruction No. 16, to the defendant's prejudice, which instruction was as follows:

> The word "cause" as used in the statute on which this indictment is based means the proximate cause. Therefore, before you are entitled to find a verdict of guilty in this cause, you should be satisfied beyond a reasonable doubt that each of these defendants whom you find guilty did some act without the doing of which act the violation of law charged in the indictment would not have taken place.

XIII.

The trial court erred in refusing to give to the jury this defendant's requested instruction No. 17, to the defendant's prejudice, which instruction was as follows:

> You are instructed that the law does not require any man to stop another or prevent another from committing a crime, and it was not the duty of either defendant in this case, even though he may have had knowledge that the transportation of intoxicating liquor charged in this indictment took place or was taking place, to take positive steps to prevent such transportations.

XIV.

The trial court erred in denying the motion for a new trial on behalf of this defendant in this:

In that said motion should have been granted and sustained by the trial court on each of the grounds stated in said motion and because of each of the errors set forth above in this assignment of errors.

XV.

The trial court erred in denying the motion in arrest of judgment on behalf of this defendant, in this, to-wit:

a. The evidence in this cause is not sufficient to sustain a verdict or to sustain a judgment upon said verdict against either of these defendants.

b. That the court erred in overruling the separate and several demurrers of each of these defendants to the first, second and third counts of the indictment in this cause.

c. Each of the first, second and third counts of the indictment in this cause is defective and void and insufficient in law to sustain a verdict of guilty for each of the following, separate and several reasons:

1. Each of said counts in said indictment is void for uncertainty in that each of said counts fails to set forth with sufficient certainty that the manufacture of intoxicating liquor for beverage purposes was prohibited by the laws of the State of Indiana at the time of the transportation alleged in each of the said counts.

2. Each of said counts of said indictment is void for uncertainty, in that each of said counts fails to set forth with a reasonable and sufficient certainty that the sale of intoxicating liquors for beverage purposes was prohibited by the laws of the State of Indiana at the time of the transportation alleged in each of said counts.

3. Each of said counts of said indictment is void for uncertainty and does not reasonably apprise this defendant of the nature of the accusation against him, in that each of said counts fails to set forth whom it was defendant caused to do the transporting alleged in each of said counts, and each of said counts does not set forth and allege that the name of that person whom it is charged defendant caused to do the transporting alleged in each of said counts is unknown to the grand jurors who returned and found the indictment in the above entitled cause.

4. Each of said counts in the said indictment is void because the act charged to have been caused to be done by said defendant, to-wit, the transportation alleged in each of said counts, is not itself made unlawful or criminal by any law of the United States.

5. Each of said counts of said indictment is null and void because the portion of Section 5 of the act of March 3, 1917, Chapter 162, 39th Statute at Large, page 1069, as amended, which provides in sustance that

> Whoever shall * * * cause intoxicating liquors to be transported in interstate commerce * * * into any state or territory the law of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished.

is null and void, because said act of Congress is without the authority of the Constitution of the United States and is in violation of the Constitution of the United States, particularly Clause 6 of Section 9 of Article I of said Constitution, which is to the effect:

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

Each of said counts of said indictment is drafted and drawn under the aforesaid portion of said act of Congress and under no other act of Congress.

7. Each of said counts of said indictment is not sufficient in law to constitute an offense against the United States.

XVI.

The trial court erred in not dismissing the indictment

against this defendant in the above entitled action because said indictment fails to charge the defendant with any crime against the United States of America.

XVII.

The trial court erred in not directing the jury to find this defendant not guilty, there being no competent evidence in the record justifying the court in submitting the case to the jury as against this defendant.

XVIII.

The trial court erred in entering judgment against this defendant upon the verdict of the jury in this case, because there is a total absence of any evidence tending to sustain the material allegations of the indictment.

XIX.

There is no competent evidence in the record justifying a verdict of guilty against this defendant.

XX.

The judgment of the court is contrary to the law.

Each assignment of error by each plaintiff in error, numbered 1 to XV, both inclusive, recite that to the respective ruling named therein each plaintiff in error duly excepted, which exception was duly allowed.

Rulings of the trial court and exceptions are at the following pages of printed record:

Overruling demurrer (R. 8.)
Refusal to give requested instructions (R. 65-69.)
Overruling motion for new trial (R. 18.)
Overruling motion in arrest of judgment (R. 18.)

BRIEF OF ARGUMENT.

POINTS.

I.

The Constitutionality of the Reed Amendment is an open question and was not decided in *U. S. vs. Hill*, 248 U. S. 420, 39 S. Ct. 143, or any other case, because the constitutionality of that act was not in issue in that case for the reason that the unconstitutionality of the statute was not a question decided by the court below and the higher court did not, therefore, decide the question.

54 Congressional Rec. 3397;

U. S. vs. Hill, 248 U. S. 420, 39 S. Ct. 143;

U. S. vs. Keitel, 211 U. S. 370; 29 S. Ct. 123, last paragraph;

U S. vs. Mescall, 215 U. S. 26; 30 S. Ct. 19, first paragraph;

Charles River Bridge vs. Warren Bridge, 11 Pet. 420, 553, 9 L. Ed. 773;

Baker vs. Grice, 169 U. S. 284, 292; 42 L. Ed. 748; 18 S. Ct. 323;

U. S. vs. Lombardo, 241 U. S. 73; 36 S. Ct. 509.

II.

The Reed Amendment is unconstitutional because in violation of and without the authority of the Constitution of the United States, particularly Clause 6, Section 9, Art. I, of the United States Constitution, because it closes the ports of States which have forbidden either the manufacture or

sale of intoxicating liquors for beverage purposes against the introduction of intoxicating liquors for all purposes except medicinal, sacramental, mechanical, or scientific purposes and makes no restriction whatever upon the ports of States which happen not to have forbidden either the manufacture or sale of intoxicating liquors for beverage purposes. It therefore prefers the ports of States which have not forbidden either the manufacture or sale of intoxicating liquors to those which have forbidden one of those things. It is anomalous legislation without precedent and inconsistent with the adopted theory of our Government. It is intermeddling with the States internal affairs and opens possibilities for partial and sectional legislation.

It is an attempt by the General Government to make local regulations while the Webb Kenyon law was a general law applying everywhere, taking all intoxicating liquors out of the interstate commerce. The different laws in different States operating under the Webb Kenyon law were the acts of the local legislatures while the different operation of the Reed Amendment in the different States is the operation of a law of the General Government, the terms of which law of the General Government expressly exclude its operation from a part of the States, and therefore create preferences.

The general Government is not authorized to pass local laws on a general subject by which it legislates as to a part only of the States. Especially is this true where the Federal act is broader and stricter than the local state law.

Its unconstitutionality was raised at all times in the trial court—

On Demurrer (R. 5-8.)

By requested instructions (R. 62. No. 14.)
Motion for new trial (R. 10A; R. 14Z.)
Motion in arrest of Judgment (R. 17.)

Authorities cited in argument are:

State vs. Sarlin, (Ind. Supreme Ct.) 123 N. E. 800;

U. S. vs. Hill, 248 U. S. 420, 39 S. Ct. 143;

Howard vs. Ill. Central R. R. Co., 207 U. S. 463, 28 S. Ct. 141;

Ill. Central R. R. Co. vs. McKendree, 203 U. S. 514, 27 S. Ct. 153;

Butte vs. Merchants, etc., Co., 230 U. S. 126, 33 S. Ct. 964;

James vs. Bowman, 190 U. S. 127, 140, 23 S. Ct. 678;

U. S. vs. Reese, 92 U. S. 214, 23 L. ed. 563;

Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550;

U. S. vs. Harris, 106 U. S. 629, 1 S. Ct. 601;

Baldwin vs. Franks, 120 U. S. 678, 7 S. Ct. 656, 661;

Brumber vs. Union Pac. R. R. Co., 240 U. S. 1, 36 S. Ct. 236;

Pollock vs. Farmers Loan & Trust Co., 158 U. S. 601, 15 S. Ct. 912;

Passenger Cases, 7 Howard 283, at page 414, 12 L. ed. 702, at page 757;

Folsom vs. U. S., 4 Ct. of Claims 366;

Armour Packing Co. vs. U. S., 153 Fed. Rep. 1, 15;

Armour Packing Co. vs. U. S., 209 U. S. 56, 80;

Giozza vs. Tiernan, 148 U. S. 657;

Caldwell vs. State of Texas, 137 U. S. 692;
Bank vs. Okely, 4 Wheat. 235;
Texas vs. White, 7 Wall. 700;
U. S. vs. E. C. Knight Co., 156 U. S. 1;
Hammer vs. Dagenhart, 247 U. S. 251;
Buffington vs. Day, 11 Wall. 113;
Coyle vs. Smith, 221 U. S. 559;
Leisy vs. Hardin, 135 U. S. 100; 10 S. Ct. 681;
Brenan vs. Titusville, 153 U. S. 289, 14 S. Ct. 829;
Vance vs. Vandercook, 170 U. S. 438, 18 S. Ct. 674;
Hollister vs. U. S., 145 Fed. 773;
U. S. vs. Paul, 6 Pet. 141, 8 L. ed. 348;
Curtis Constitutional History of the U. S., Vol. 1. page 7, 521, 497;
Dawson's Federalist, page 86;
V. Elliott, 113, 130, 478, 479, 483, 484, 543, 545;
Indiana Acts 1917 (page 15 *et seq.*);
Prentice & Egan on the Commerce Clause 306;
Reed Amendment, 39 St. at L. 1069;
Webb Kenyon Law (37 St. at L. 699, Sec. 8739 Comp. St. 1916);
West Virginia Acts, 1917, p. 183 (Sec. 31, Chap. 58);
West Virginia Acts, 1919, p. 386 (Sec. 31, Act passed Feb. 20, 1919);
Wilson Act (26 St. at L. 313, Sec. 8738 Comp. St. 1916).

III.

The Reed Amendment does not describe an offense because it purports to punish for causing something to be

done, the doing of which thing is not made unlawful. Likewise, and for the same reason, an indictment drawn in the language of the Reed Amendment is insufficient. The word "cause" in the Reed Amendment follows the words "order" and "purchase," and being a general word means a causing of the nature and kind, as ordering and purchasing. Therefore, the Reed Amendment does not describe acts within the competency of Congress to punish. Also Congress by trying to punish the aiding and abetting of something, to-wit, the transportation which it has not by the terms of the act made unlawful, fails to describe an offense.

This point was raised by:

Demurrer (R. 6, point 4);
Requested instruction (R. 62, No. 12);
Motion for new trial (R. 10A, R. 14Y);
Motion in arrest of judgment (R. 16B, R. 17, point 4).

Cases cited in the argument are:

Collins vs. U. S., 263 Fed. 657;
U. S. vs. Bevans, 3 Wheat. 336, 4 L. ed. 404;
Reiche vs. Smythe, 80 U. S. (13 Wall.) 162, 2 L. ed. 566;
Sarlls vs. U. S., 152 U. S. 570, 14 S. Ct. 720;
Hollender vs. Magone, 149 U. S. 586, 13 S. Ct. 932;
U. S. vs. Celluloid, 82 Fed. 627;
Newport, etc., vs. U. S., 61 Fed. 488;
Western Co. vs. Heldmaier, 111 Fed. 123.

IV.

The joinder of misdemeanors in the first three counts

of the indictment with the fourth count, which was a felony, renders the indictment void for misjoinder.

This point was raised by:

Demurrer (R. 6, point 5);
Requested instructions (R. 62, No. 13);
Motion for new trial (R. 10A);
Motion in arrest of judgment (R. 16B).

V.

The word "or" used in each count of the indictment charging the manufacture or sale, etc., was prohibited, renders each count void for indefiniteness. The conjunctive "and" should have been used.

This point was raised by:

Demurrer (R. 6, points 1 and 2);
Requested instructions (R. 61, Nos. 9 and 10);
Motion for new trial (R. 10, A; R. 13, V. and W.);
Motion in arrest of judgment (R. 16, B. R. 16, C. 1 and 2).

Cases cited in the argument are:

State vs. Sarlin (Sup. Ct. Ind.), 123 N. E. 800, point 4;
Young vs. State (Sup. Ct. Ind.), 124 N. E. 679;
Ackley vs. U. S., 200 Fed. Rep. 217, points 1 and 2.

VI.

The indictment did not reasonably or sufficiently apprise plaintiffs in error whom it was they caused to transport liquor nor did the indictment aver that the name of

that person was unknown to the grand jurors who found the indictment.

This point was raised by:

Demurrer (R. 6, point 3);

Requested instructions (R. 61, No. 11);

Motion for a new trial (R. 10A. R. 13X);

Motion in arrest of judgment (R. 16B. R. 16C. 3).

Cases cited in argument are:

U. S. vs. Simmons, 96 U. S. 360, 24 L. ed. 819;

Miller vs. U. S., 136 Fed. Rep. 581.

VII.

The trial court should have defined to the jury the word "cause" as requested in requested instruction No. 16.

This point was raised by:

Requested instructions (No. 16, R. 62);

Motion for new trial (R. 14AA).

VIII.

The trial court should have given to the jury the statement of duty of these plaintiffs in error requested in their requested instructions No. 17.

This point was raised by:

Requested instructions No. 17 (R. 62);

Motion for new trial (R. 15BB).

IX.

There is no evidence that either of these plaintiffs in erorr caused the intoxicating liquors described in either

count of the indictment to be transported in interstate commerce.

The witness, Harry Hudson, a confessed accomplice, is not corroborated.

This point was raised by:

Requested instructions Nos. 1, 2, 3, 5, 6, 7, 18 and 19 (R. 60-63);

Motion for new trial (R. 10-13);

Motion in arrest of judgment (R. 16A).

Case cited in the argument is:

Sykes vs. U. S., 204 Fed. Rep. 909.

X.

The defendant in error failed to prove a material part of its case that the intoxicating liquors mentioned in the indictment were not caused to be transported for scientific, sacramental, medicinal or mechanical purposes.

This point was raised by:

Requested instructions Nos. 1, 2, 3, 5, 6, 7, 18 and 19 (R. 60-63);

Motion for new trial (R. 10-13);

Motion on arrest of judgment (R. 16A).

Cases cited in the argument are:

U. S. vs. Cook, 17 Wall. 168, 21 L. ed. 538;

U. S. vs. Britton, 107 U. S. 655, 2 S. Ct. 512;

Coffin vs. U. S. 156 U. S. 432, 15 S. Ct. 394, 405;

Davis vs. U. S., 160 U. S. 469, 16 S. Ct. 353.

ARGUMENT.

POINT I.

THE CONSTITUTIONALITY OF THE REED AMENDMENT IS AN OPEN QUESTION.

The only place in the reports of opinions by the Supreme Court of the United States in which the constitutionality of the Reed Amendment is spoken of distinctly is in the dissenting opinion by Mr. Justice McReynolds, in the case of *U. S. vs. Hill*, 248 U. S. 420, 39 S. Ct. 143. The main opinion in that case uses language argumentatively in support of the act, but does not purport to decide its constitutionality.

In fact the constitutionality of the act was not an issue in that case, which was brought to this court by writ of error in the behalf of the United States authorized by the act of March 2, 1907.

As was held in the last paragraph of the opinion in the case of *U. S. vs. Keitel*, 211 U. S. 370, 29 S. Ct. 123.

> "That act, (the act of March 2, 1907,) we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, it contemplates vesting this court with jurisdiction only to review the particular question decided below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower courts concerning the subjects embraced within the clauses of the statute and not to open here the whole case. * * *"

Likewise in the first paragraph of the opinion in *U. S. vs. Mescal*, 215 U. S. 26, 30 S. Ct. 19, the court said:

> "But our inquiry is limited to the particular question decided by the court below."

What questions therefore were decided by the District Court of the United States for the Southern District of West Virginia in the Hill case, supra? It seems that the demurrer and motion to quash in that case were oral, but the District Court rendered a written opinion which shows that the grounds of decision of the trial court in sustaining the demurrer were two.

First. The carrying of the liquor by Dan Hill into West Virginia for his own use did not constitute interstate commerce within the language of the Reed Amendment.

Second. The Reed Amendment should be construed as the Webb-Kenyon law had been construed, in harmony with and not broader than the state law.

The constitutionality of the act was not raised before the trial court and was not therefore a question decided by that court. Likewise, the constitutionality of the act was not decided by this court.

Charles River Bridge vs. Warren Bridge, 11 Pet. 420, 553, 9 L. ed. 733;

Baker vs. Grice, 169 U. S. 284, 292, 42 L. ed. 748, 18 S. Ct. 323.

The case of *U. S. vs. Lombardo*, 241 U. S. 73, 36 S. Ct. 509, was one brought to this court by the government under the act of March 2, 1907, where the court below sustained a demurrer to an indictment on two grounds:

First. The unconstitutionality of the statute.

Second. The lack of jurisdiction of that particular trial court.

This court sustained the ruling of the trial court on the second ground of demurrer and declined to pass upon the first. This court held that the prosecution should have been brought in the District of Columbia instead of in the District Court of the State of Washington where the prosecution had been begun.

The opinion in the Hill case does not purport to decide the constitutionality of the Reed Amendment, so it is but fair to this court, the government, and these plaintiffs in error to regard this as still an open question in this court and to consider the language used in the main opinion which might be construed as argumentatively in support of the act as dicta. We make no contention inconsistent with the decision in the Hill case. The language of the Congress is plain. That the Reed Amendment was intended to apply to states in a stricter way than the state laws themselves was recognized by Senator Kenyon in opposing the amendment in the Senate as inimical to the temperance legislation. (See Vol. 54, Congressional Record, page 3397, top of first column.)

POINT II.

The Reed Amendment Is Unconstitutional.

As now construed for the purpose of this case the Reed Amendment forbids causing intoxicating liquors to be transported in interstate commerce except for scientific, sacramental, medicinal or mechanical purposes into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for

beverage purposes. That is if a State forbids the manufacture of intoxicating liquors for beverage purposes it is unlawful to cause the transportation of intoxicating liquors into that State for any purpose except for scientific, sacramental, medicinal or mechanical purposes, or, if a State forbids the sale of intoxicating liquors for beverage purpose it is unlawful to cause the transportation of intoxicating liquors into that State for any purpose, except for scientific, sacramental, medicinal or mechanical purposes.

As the enforcement of the Reed Amendment by the trial courts and public officials has been on the theory that the terms of the Reed Amendment forbid the transportation of intoxicating liquors except for scientific, sacramental, medicinal or mechanical purposes into a State the laws of which forbid either the manufacture or sale of intoxicating liquors for beverage purposes, for sake of simplifying the question now being considered, this point of the attack on the constitutionality of the act will be on the assumption that the terms of the act are sufficient to effect such prohibition of transportation, but no statement in this brief is to be construed as an admission of such fact. The question as to whether the statute constitutionally or effectually describes an offense is reserved for treatment under Point III. All statements in this brief to the effect that the terms of the Reed Amendment do effect such prohibition of transportation will please be understood as made with the reservation of the attack made under Point III hereof, and this statement is made so that the act may be considered as it is popularly interpreted and enforced in respect to the broader question of its constitutionality without the consideration thereof being encumbered by a repetition of

words reserving the contention presented under Point III each time the act is spoken of here.

A history of the legislation of Congress on interstate traffic in intoxicating liquors discloses a radical difference between the Reed Amendment and prior legislation on this subject. The first of such legislation was the Wilson Act. It was occasioned by reason of the fact that when some of the earlier States to adopt prohibition measures attempted to enforce their laws the accused would defend on the ground that his alleged sale was the sale of an article in the original package brought into the State in interstate commerce. It was held that the State's laws could not interfere with interstate commerce by punishing a man for selling within its borders such an article of interstate commerce. To remove this defense in the state court the Wilson Act was passed.

It provided:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act of August 8, 1890, 26 Statutes at Large, 313, Sec. 8738, of the Compiled Statutes of 1916.

This act was construed not to remove the defense in the State courts that the article was one in interstate commerce, in all instances. So to further remove defenses of

persons accused of violating State prohibition laws Congress enacted the Webb-Kenyon Act of March 1, 1913, 37 Statutes at Large 699 (Sec. 8739 Compiled Statutes 1916). It was entitled, "An Act divesting intoxicating liquors of their interstate character in certain cases," and provided as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in original package or otherwise, in violation of any law of such State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The Webb-Kenyon Act in accordance with its title has been construed merely as divesting intoxicating liquors of their interstate character in the cases mentioned in that statute.

It did not create any offense within the jurisdiction of the United States courts. It merely said to the State, if anyone does an act forbidden by your laws, we will take away from him a defense in your court that he had a right to do the act because the article forbidden was an article of interstate commerce. No form of prohibition was thrust

upon the State by either the Wilson or Webb-Kenyon acts. Congress in neither of those acts in effect prohibited intoxicating liquors from going into any State. The matter of bringing intoxicating liquors into a State as well as transactions in intoxicating liquor within the State was left by both acts entirely to each State without any interference on the part of the Federal Government.

Not so with the Reed Amendment. Here Congress says to a State, if you forbid the manufacture of intoxicating liquors for beverage purposes, though you may permit their sale and allow their presence and use there, anyone who may cause intoxicating liquors to be brought into the State except for scientific, sacramental, medicinal, or mechanical purposes, will be punished in the United States courts. Congress has by the Reed Amendment erected a barrier around such State and policed the borders and territory of that State to apprehend and put in jail those who transport liquor into such State. Citizens of an adjoining State which has not forbidden the manufacture of intoxicating liquors for beverage purposes, and which likewise permits their sale and allows their presence and use there are allowed by the officials of the government to bring into its borders and territory unmolested all the intoxicating liquors they want for any purpose they desire.

A State may forbid both the manufacture and sale of intoxicating liquors for beverage purposes, yet allow its citizens to bring in, and possess and personally use, intoxicating liquors for beverage purposes. But Congress, through the terms of the Reed Amendment, says, if you do bring in such intoxicating liquors for your own use you will be prosecuted in the federal court, though the federal authorities are not authorized by this act to interfere with

the citizens of an adjoining State who bring in their State intoxicating liquor for their personal use, because the latter State may not have forbidden the manufacture or sale thereof for beverage purposes.

In this case plaintiffs in error are charged with carrying intoxicating liquors into Indiana by automobile. This is not a violation of any Indiana statute. A citizen of Indiana had a right to use intoxicating liquor at that time. (*State ex. Sarlin*, decided in Supreme Court of Indiana, June 24, 1919, 123 N. E. 800, last paragraph, page 801.) In West Virginia at that time a person was permitted by the statutes of that State to bring in a quart of whiskey for his own beverage every thirty days. (See *U. S. ex. Hill, supra*, 248 U. S. 420, 39 S. Ct. 143.) Other States have similar laws. (Such portions of the Indiana and West Virginia statutes as are deemed necessary to the decision of this case are printed at length in the last pages of this brief under heading "Appendix.")

While the evidence in this case is not sufficient to show a violation of the laws of Indiana the determination of the constitutionality of this act is not alone upon the objections which the facts in this particular case entitle us to urge, but upon an examination of the statute in view of its operation anywhere in the United States upon any person who might be affected by it.

If the act is unconstitutional in West Virginia or any other State it is unconstitutional in Indiana and vice versa.

In the case of *Howard ex. Ill. Central R. R. Co.*, 207 U. S. 463, 28 S. Ct. 141, the first railroad employers act was held unconstitutional because its terms were broad enough to apply to employees of a carrier engaged in interstate commerce even though the employees of such a carrier might not themselves be engaged in interstate commerce.

It was held unconstitutional though the employe in this particular case was actually engaged in interstate commerce. The entire statute was held unconstitutional although some of its provisions were constitutional. To sustain the act with its unconstitutional features stricken out, it was held, would be on the part of the court a writing of a new act.

The case of *Ill. Central R. R. Co. vs. McKendree*, 203 U. S. 514, 27 S. Ct. 153, involved the validity of a regulation of the Secretary of Agriculture which fixed a quarantine line within a State and forbade the transportation of cattle over that line. Here, though the question was raised by a party who actually crossed the line in interstate traffic, it was held that the regulation by its general terms was broad enough to include intra as well as interstate traffic and was therefore totally void.

The entire act is void because the valid part cannot be separated from the invalid part. Its validity must be determined according to its terms and not upon whether a particular enforcement of it is a constitutional exercise of power.

Butts vs. Merchants, etc., Co., 230 U. S. 126, 33 S. Ct. 964.

A statute too broad to be valid will not be narrowed to make it constitutional.

James vs. Bowman, 190 U. S. 127, 140, 23 S. Ct. 678;

U. S. vs. Reese, 92 U. S. 214, 23 L. ed. 563;

Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550;

U. S. vs. Harris, 106 U. S. 629, 1 S. Ct. 601;

Baldwin vs. Franks, 120 U. S. 678, 7 S. Ct. 656-661.

A statute may be void though enacted by virtue of a plenary power of Congress if the statute is in violation of a constitutional restriction on that power.

Brusaber vs. Union Pac. R. R. Co., 240 U. S. 1, 36 S. Ct. 236;

Pollock vs. Farmers' Loan & Trust Co., 158 U. S. 601, 15 S. Ct. 912.

Therefore if the Reed Amendment as construed in the Hill case is unconstitutional it is void *in toto*. The question is, has Congress authority from the Constitution to do what has been attempted by the terms of the Reed Amendment?

The subject of the regulation of intoxicating liquors may be divided into three fields:

1. The manufacture.
2. The sale.
3. Personal use.

Each represents a separate field within the police power of the State. The Reed Amendment says to a State, if you forbid No. 1 or No. 2 federal authorities will seal your ports against the introduction of liquors for the other two purposes, but the ports of your neighboring State, which does not forbid either No. 1 or No. 2, though it may forbid No. 3, are left free from interference by federal authorities. The Reed Amendment has no precedent to sustain it. If Congress had forbidden intoxicating liquors to go anywhere in interstate commerce such legislation would have operated analogously to the Food and Drug laws. If Congress had said it shall be unlawful to transport intoxicating liquors into a State in violation of the laws of that State the sanction of this court given the Webb-Kenyon law would have argued in support of the validity of such a law. But

in the Reed Amendment Congress has done neither of these things. The Reed Amendment says if a State makes one thing unlawful relative to a certain commodity the Federal government will use its police officers and criminal courts to keep that article out of that State even though that State may require or permit the introduction of the particular article. How can such legislation, directly in conflict with the law of that State be said to be in aid of the law of the State?

What authority has Congress to close the ports of one State against the introduction of an article which that State permits to be brought within its territory and not also by the same act close the ports of a neighboring State which likewise permits the same thing to be introduced.

Clause 6, Sec. 9, Article I, of the United States Constitution provides:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

The term port applies to domestic commerce as well as foreign. (See last three paragraphs of opinion in *Knott vs. Botany Worsted Mills*, 179 U. S. 69, 21 S. Ct. 30.)

Justice Swayne in the passenger cases, 7 Howard 283, at page 414, 12 L. ed. 702, at page 757, speaking of this clause of the Constitution, says it

> "is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States. * * *"

In the case of *Folsom vs. U. S.* 4 Court of Claims 366, a tax on shipments from the Confederate States to Northern

States was upheld as a condition to a permission granted by the President during war, but the court there said if it were not a war measure, Clause 6, Sec. 9, Article I, of the Constitution, would invalidate such a provision.

This clause of the Constitution does not forbid a regulation of commerce which might provide for the extensive improvement of the harbor of New York, and not make a similar provision for the harbor of Norfolk, Va. Such acts of Congress apply to the particular ports, and because one happens to be in the State of New York and the other in Virginia does not make the law one preferring the State of New York to the State of Virginia. The discrimination does not operate by States. That is, it is not a preference of the State of New York. Likewise the railroad rate regulating statute of the United States was held not to violate this provision of the Constitution because, by failing to regulate rates by water, it may have favored ports which were served by water over those which were served by rail. But here again the act was not operative by States within the terms of this clause of the Constitution. Such preferences as may have resulted were not by States, but were accidental to the plan of the law and were not included within the purpose of its plan.

In discussing this clause of the Constitution with reference to the rate regulating statute (*Armour Packing Co. vs. U. S.*, 153 Fed. 1, CCA. 8th Circuit, at page 15) the court said:

> "The paragraph of the Constitution before us was enacted for the purpose of preventing Congress from so exercising its power to regulate commerce as to give to one State an advantage over another State by the enactment of a regulation which would prefer the

ports of the former to those of the latter. The purpose and the extent of its inhibition are clearly expressed in its terms. It does not forbid a preference of ports of various States reached by inland water routes over those reached by rail, or a preference of those reached by many over those reached by a few railroads or steamboats, but only those of one State over those of another. It forbids the preference of the ports of one State because they are located in that State over the ports of another State because they are situated in the latter State. * * *"

The Armour case reached this court and in passing on this point, this court said:

> "This provision was intended to prevent legislation intended to give, and having the effect of giving, preference to the ports of one State over those of another State." *Armour Packing Co. v. U. S.*, 209 U. S. 56, at page 80, 28 S. Ct. 428, at page 435.

All the cases which have been before this court in which a statute was questioned because in violation of this clause of the Constitution have been those where the alleged preference was not intended by the terms of the act, and the act did not purport to operate, by States. In order, therefore, for an act to be invalid by virtue of this provision of the Constitution it must be apparent that the act not only does prefer the ports of one State over those of another and that such preference was intended to act not against individual ports which might or might not be in the same or different States, but the preference must operate by States. This is what the Reed Amendment does. It operates as a preference of all the ports of a State which does not forbid the manufacture or sale of intoxicating liquors over the ports of a State which forbids either such manu-

facture or sale, by forbidding the causing of the transportation of intoxicating liquors into the latter State except for scientific, sacramental, medicinal or mechanical purposes and places no restrictions whatever upon liquors to go into other States.

Suppose Indiana forbids the manufacture of intoxicating liquors for beverage purposes and Kentucky does not, and a man comes from Cincinnati, Ohio, down the Ohio river with a quart bottle of whiskey in his pocket to Evansville, Indiana, lands there and is arrested by a United States marshal and put in jail. If he had landed across the river at Henderson, Kentucky, the United States officials in effect would have welcomed him. Why? Not because intoxicating liquor is any more injurious to the citizens of Evansville, Indiana, than it is to the citizens of Henderson, Kentucky, not because Indiana has forbidden his coming to Evansville, not because the quart of whiskey would injure this man in Evansville, Indiana, more than it would injure him in Henderson, Kentucky, but because Congress has preferred the port of Henderson, Kentucky, to the port of Evansville, Indiana, in fact all the ports of Kentucky to all the ports of Indiana. It was the purpose and intent of this act to make this preference of ports of one State over those of another a preference not for any reason in the nature of things, but an arbitrary preference.

The text-book of Prentice & Egan in discussing this clause of the Constitution in the following quotation from page 306 of their book bring out the fact that this clause of the Constitution used language applying to means of transportation contemporaneous with the making of the

Constitution, but that it applies to all forms of transportation:

> "Freedom of transportation from conflicting, discriminating and burdensome restrictions was the purpose of the Constitution, and while the language employed was almost necessarily such as referred to the means of transportation then in existence and within the knowledge of the Convention, nevertheless the operation of the Constitution is not confined to instrumentalities of commerce then known, but keeps pace with the progress of the country and is adapted to new developments of time and circumstance."

Throughout this case the Reed Amendment has been challenged as null and void because it "is without the authority of the Constitution of the United States and is in violation of the Constitution of the United States, particularly Clause 6 of Sec. 9 of Article I of said Constitution," etc.

It is challenged because it violates a conscionable interpretation of the whole Constitution of the United States, the nearest express embodiment of the principle of the Constitution which it violates being the aforesaid Clause 6 of Sec. 9 of Article I of said Constitution, but our claim of the invalidity is not founded alone on the express language of said clause of the Constitution.

Suppose Congress in the exercise of its so-called plenary power over interstate commerce should enact

(a) That it shall be unlawful for a white man to go into a State the majority of whose inhabitants are of African descent. or

(b) That it shall be unlawful to ship cigarettes into any State whose laws forbid their use by females or by persons under 16 years of age, or

(c) That it shall be unlawful to ship saccharin into any State whose laws forbid that article be fed to infants, or

(d) That it shall be unlawful to ship apples into any State whose board of health has forbidden that apple pie be fed to school children.

It is difficult to believe that any such legislation is a valid exercise by Congress of its constitutional power.

The Constitution contemplates that Federal laws should operate the same on all citizens of the United States regardless of the particular State. Where congressional legislation does operate differently in different States in all instances except the Reed Amendment the difference is in accordance with, and no broader than, the laws of that State. The latter specie of legislation is in the nature of an exception to the general rule of uniformity where the Congress has enacted legislation in aid of the State law. There it might be argued in support of the exception that the State has waived for its citizens a claim of preference. There it might also be argued that he who asserts the invalidity of the Federal law comes into court as a violator of the law of his own State. To confine Congress to enactments of legislation in accordance with and in harmony with the law of those States does not open possibilities for sectional and injurious legislation. In such instances the States are left entirely free to remove or alter the effect of such discriminatory legislation, because its operation is no broader than the State law. But, if Congress can say when a State says one thing shall not be done it shall be unlawful to do another or additional thing not forbidden by the State law, this hampers the legislative freedom of the State and admits the power of Congress to prefer one State to another arbitrarily and possibly ruinously.

In harmony with the restriction by the Constitution on Congress forbidding preferences of States in its regulation of commerce are the mandates of the Constitution found in Clause 1, Section 8 of Article 1 of the Constitution, "but all duties, imposts and excises shall be *uniform* throughout the United States," and in Clause 4 of the same section of the Constitution Congress is authorized "To establish an *uniform* rule of naturalization, and *uniform* laws on the subject of bankruptcies throughout the United States."

The fifth amendment of the Constitution provides, "No person shall * * * be deprived of life, liberty or property without due process of law * * *." A similar restriction is imposed upon States by the fourteenth amendment. In the third from the last paragraph of the opinion (*Giozza vs. Tiernan*, 148 U. S. 657, 13 S. Ct. 721) this court said relative to the term "due process" in the fourteenth amendment:

> "And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the following paragraph this court said:

> "This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree."

In that case a statute of Texas was under consideration. In this case the United States is the unit under consideration. Can it be said that the Reed Amendment affects a citizen of a State which has forbidden the manufacture or sale of intoxicating liquors who may desire to

bring home from another State liquor for his own use in exactly the same manner and degree as it affects a citizen of another State who also may desire to bring home from another State liquor for his own use when his State has not forbidden the manufacture or sale of intoxicating liquors?

Also in *Caldwell vs. State of Texas*, 137 U. S. 692, 11 S. Ct. 224, this court speaking of due process in the fourteenth amendment at page 697 said:

> "And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Bank v. Okely*, 4 Wheat. 235, 244. The power of the state must be exerted within the limits of those principles, and its exertion canot be sustained when special, partial and arbitrary."

> "The Constitution in all its provisions looks to an indestructible Union, composed of indestructible States."
>
> *Texas vs. White*, 7 Wall. 700, 725, 19 L. ed. 227.

The following quotation is taken from *U. S. vs. E. C. Knight Co.*, 156 U. S. 1, 15 S. Ct. 249, at page 254, this being the case which held that purchase of a number of sugar refineries in a State did not necessarily affect interstate commerce so as to violate the Sherman act: (P. 13.)

> "It is vital that the independence of the commercial power and of the police power and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of govern-

ment; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The following quotations are taken from *Hammer vs. Dagenhart*, 247 U. S. 251, at pages 273, 275, 38 S. Ct. 529, the case which held the child labor statute unconstitutional:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."
>
> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution."

The case of *Buffington vs. Day*, 11 Wall. 113, 20 L. ed. 122, was one where a statute of the United States taxing the salary of a judge of a State court was held void. The following quotations are from the opinion in that case at pages 124, 125, 127, 128, respectively:

> "It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the 10th article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or to the people.' The Government of the United States, therefore, can claim no powers which are not

granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the 10th amendment, 'reserved', are as independent of the General Government as that government within its sphere is independent of the States." * * *

"Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guaranties to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. * * *"

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that

> government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" * * *

And this court in that case, quoting from an opinion in another case, said:

> "It is conceded in the opinion, that, 'the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State Government, are not proper subjects of the taxing power of Congress.'"

The case of *Coyle vs. Smith*, 221 U. S. 559, 31 S. Ct. 688, was one in which this court held that Congress could not in the statute admitting Oklahoma to the Union forbid the removal of the capitol of Oklahoma from Guthrie for a period of years after that State was admitted to the Union. The following quotations are taken from that opinion at pages 565, 573 and 580, respectively:

> "The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate at the time of its admission? The argument is, that while Congress

may not deprive a State of any power which it possesses, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union and the constitutional duty of guaranteeing to 'every State in this Union a republican form of government.' The position of counsel for the plaintiff in error is substantially this: That the power of Congress to admit new States, and to determine whether or not its fundamental law is republican in form, are political powers, and, as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon 'an equal footing with the original States.'" • • •

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." • • •

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

Oklahoma approved the enabling act at the time it adopted its Constitution. A State cannot bargain away

its independence nor can Congress impair it as a condition to its admission to the Union. Much less could it be thought that Congress could hamper the legislative freedom of a State which is already a member of the Union.

The ninth amendment of the Constitution provides:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 4 of Article IV of the Constitution provides:

> "The United States shall guarantee to every State in this Union a republican form of government. * * *"

The States existed prior to the formation of the United States. They are "indestructible States."

Congress within its jurisdiction has its independent power. But it cannot destroy the States or their independent action. If this court should sustain the constitutionality of the Reed Amendment it sanctions the power of Congress to pass laws that interfere with the legislative freedom of the States. A State Legislature might be perfectly willing to forbid the manufacture of intoxicating liquor or its sale, yet would hesitate so to do because Congress will cut off from that particular State its supply in interstate commerce.

Or a State might be willing to abolish the distillery

and saloon but be willing to permit personal use, as was the case in West Virginia and Indiana, yet might hesitate so to do if its ports were to be sealed against the introduction of liquor in interstate commerce. At least the Legislature of such a State in passing laws must consider not only the provisions of the law it passes, but it must consider how much broader an act of Congress will enforce prohibition in that State if the Legislature sees fit to prohibit either manufacture or sale. By the terms of the Reed Amendment the Legislature is no longer free to provide its own regulations on prohibition. The Reed Amendment nullifies such absolute freedom. Congress overlooks the fact that the pernicious action of the saloon in State politics and the misconduct of the saloons has had much to do with the prohibition wave. For Congress to assume that because a State has stopped the sale of liquor within its borders, though it may permit its manufacture or personal use, the State has manifested an intention to keep out all liquor is, of course, unwarranted. A State to conserve food and labor might forbid the manufacture of intoxicating liquor for beverage purposes, and yet allow it to be imported, sold and used. To forbid intoxicating liquors going into such a State would plainly not be in aid of that State's law.

As the Reed Amendment is a new departure in legislation analogies from preceding acts of Congress are not available, so to assist in allocating this act it is necessary to apply this form of legislation to hypothetical cases.

Suppose Congress should provide that whereas some of the States of the United States have enacted income tax laws, and whereas the United States government can be of

assistance to such States in the execution of those laws by virtue of its broader territorial powers of investigations, a tax of 10 per cent. upon the income of each person residing within a State having such an income tax statute is hereby imposed and the information and returns required of the taxpayers in such State shall be available to the taxing officers of such a State.

Here, it may be said, a part only of a complete power has been exercised. Here a statute of Congress acts uniformly on all in like situation, that is, on all who reside in a State having an income tax statute. Here the government's action will be of tremendous aid to the State in the execution of its laws, for the government can investigate by compulsory process sources of income in California as well as in New York. But could it be thought for a moment that such a statute of Congress is a valid exercise of the taxing power. And yet every argument urged in favor of the validity of the Reed Amendment can be urged to support such a tax act.

It is bred in us from our knowledge of the history of this country and from the tone of the Constitution itself that the *National Government* is the *General Government*. Its congressional acts normally apply to the United States as a unit. Many cases in the Supreme Court comment on the fact that commerce between the States was placed under the control of Congress in order that broad general regulations, free from the discriminations and whims of the various individual States, might be made. Did the framers of the Constitution contemplate that Congress in the exercise of this power could say to a State if your Legislature forbids the manufacture of intoxicating liquors

for beverage purposes we will close the channels of interstate commerce at every port of entry into your State against the introduction of all intoxicating liquors into your particular State, but, if your Legislature permits both manufacture and sale thereof, we will not close your ports.

The effect of the power given Congress to regulate interstate commerce is to prevent the State from interfering with the freedom of such commerce except by consent of Congress. Absence of such consent means interstate commerce must be absolutely free.

Brennan vs. Titusville, 153 U. S. 289, 14 S. Ct. 829.

Intoxicating liquors were before the Eighteenth Amendment legitimate articles of commerce and out of this fact arose the occasion of Congress passing the Wilson and the Webb-Kenyon acts.

Leisy vs. Hardin, 135 U. S. 100, 10 S. Ct. 681.

The following observations are taken from the opinion in the case of *Vance vs. Vandercook Co.*, 170 U. S. 438, 18 S. Ct. 674: (See pages 452 and 455.)

> "But the right of persons in one State to ship liquors into another State to a resident for his own use is derived from the Constitution of the United States. * * *"
>
> "* * * But the right arises from the Constitution of the United States. * * *"

This was undoubtedly true at the time the Reed Amendment was passed and was true when this case arose. In 1918 the manufacture of intoxicating liquors was a subject of tax by the Federal government. Intoxicating liquors were legitimate articles of commerce protected by the Fed-

eral Constitution. Certainly if Congress could restrict their freedom in interstate commerce, the power to make such restriction must of necessity spring from the Constitution and be exercised in accordance with the limitations of the Constitution. This case cannot, therefore, be brushed aside on the theory that intoxicating liquor is not within the protection of the Constitution and that regulations of intoxicating liquor in interstate commerce are not subject to tests for their constitutionality.

Why should Congress in enacting legislation supposedly in aid of State laws be required to make its provisions exactly coincide with the State's laws?

1. Such a rule leaves the State's internal regulations entirely within its own control, affecting its people only in so far as their own lawmaking bodies have provided. Congress is literally and actually supporting the State. The State laws can be changed or modified without affecting its own citizens to any different extent than the terms of the State statute itself.

2. If Congress can say where a State forbids the manufacture of intoxicating liquors for beverage purposes it shall be unlawful to ship liquor into such a State, for lawful use within that State, a State is deprived of the right to make this regulation against the manufacturer of intoxicating liquors except upon the penalty of having its ports closed against the introduction of all liquor. But it may be suggested that Congress has breathed the spirit of the Legislature of that State and it has a discretion to interpret the spirit of the laws of that State and has discretionary power to decide independently of the provisions of the State law what is in aid of the State law. This would be a substitution of the will and judgment of Con-

gress on the internal affairs of the State for the will and judgment of its own legislature.

3. What harm can come from permitting the law-making body of the General Government to decide the problems of a particular State?

When a statute is passed forbidding poisons to go anywhere in interstate commerce such an act of Congress represents the judgment and wisdom of a majority of the representatives of the people of the whole United States. A congressman from Maine is voting for the same thing to be prohibited from his State that is prohibited from Indiana, Texas, California, and every other State. The effect of the act is the same over the entire United States. If it deprives a citizen of Maine of something he wants (except in such States where the article is produced) it affects citizens of other States in a like manner. Congress is presumably an expression of our national sentiment, and must be responsive to the will of the majority of the people of the nation as a unit. To the extent that Congress can legislate with effect different in one State than in others so far is Congress able to act without responsibility to the whole people. A State thus affected can appeal only to its own representatives in Congress; the constituents of other representatives in Congress are not affected in the same way and therefore have not the same interest. The State's own representatives may be in the vast minority. They may approve the sectional legislation or disapprove it. Whether they do or do not, if it is claimed Congress can pass such sectional legislation, can any one point out where in the Constitution the States have granted power to Congress to pass legislation not general, but operative, by States? Such power was

never granted. Such powers as were given Congress were to act as the legislative body of the entire United States. To say Congress has any other power is to admit that ours is not a government of the people, but is a government of one portion of our people by another portion. By this I do not attack the rule of the majority over the will of the minority. I affirm that doctrine, but do point out that the rule of the majority over the minority can never be just or consonent with the sentiment of the majority if the action of the majority is not to affect and operate upon all, both majority and minority. For in such an instance the majority of the people affected by such legislation and who feel its brunt may have a minority of the whole representation in Congress, with the result that a minority or no part of the people affected by aid of those who have excluded themselves from the operation of the statute, may thrust upon another section legislation in opposition to the sentiment and will of the majority affected thereby, resulting in a rule over the majority affected by the minority exactly contrary to the theory of our government. The government formed by our States when they adopted the Federal Constitution was a General Government. The vast power given Congress by the States could have been surrendered only in contemplation that the representatives in Congress were to represent the sentiment and desire of the entire people. There could be no sentiment and desire of the entire people if a part only were to be interested in and affected by the enactments of Congress. A representative in Congress enters upon his duties with instructions from his constituents upon such issues as have preceded his election. The only check upon his action is his responsibility to his constituents for having carried out their desire.

If members of Congress can legislate by States, the States affected by this legislation are not on an equal footing with States not so affected. They are subject States more like the Philippine Islands. What security has Indiana against possible oppression by Congress save as the people in the forty-seven other States may likewise feel the same pinch and join with the people of Indiana in making their will predominate Congress. Where Congress forbids liquor to go in interstate commerce into a State to be received, possessed or used in violation of the laws of such State the basis of the offense is a violation or threatened violation of the law of that State. Such a Congressional act affects such a State only to the extent the State itself has provided. It can change its laws at its will in any manner and the Federal statute operates only upon and precisely in aid of the State statute. Here the entire people affected and no one else have absolute power to change the effect of such a statute, and a rule by the majority affected still obtains. Reverting again to the three fields pertaining to regulation of intoxicating liquors: (1) Manufacture. (2) Sale. (3) Personal use. For Congress to enact that, if a State forbids manufacture and permits sale and personal use, all intoxicating liquors shall be kept out of that State except for scientific, mechanical, medicinal or sacramental purposes, is not an exercise of the power of Congress to pass a general regulation of liquor in interstate commerce. Nor is such an exercise impliedly within such power to make such a regulation because the power to locally regulate by discrimination and preference is not necessary to carry out the power to make a general regulation.

History of the No Preference Clause.

The no preference clause of the Constitution, which is one of the clauses relied upon in this case, has not been extensively discussed in the opinions of the Supreme Court. Therefore, it is perhaps my duty to place in this brief a resume of its history.

Control of commerce has always been recognized as a weapon of warfare. Warring nations resort to embargoes and blockades. The first delegates to the Continental Congress were elected by Virginia in 1774 on receipt of news that an act of Parliament had closed the port of Boston.

> Curtis, Constitutional History of the United States, Vol. I, page 7.

During the life of this country under the Articles of Confederation, the States refused to surrender to the General Government any power to regulate commerce except as follows:

> "No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any King, Prince or State in pursuance of any treaties already proposed by Congress to the Courts of France and Spain."
> Clause 3, Art. 6, Art. of Confed.

This was limited to treaties "already proposed" by Congress.

Though effort upon effort was made to induce the States to surrender to the General Government power over interstate and foreign commerce, the States never granted such power. Appeal was made on the grounds that agents

of the General Government were handicapped in negotiating agreements.

Gradually the need of the power of the General Government to exercise certain control over commerce among the States and with foreign nations became more and more manifest. This lack of power, together with lack of taxing power and other weaknesses of the Confederation, led to steps toward the formation of a new agreement—the Constitution.

Apparently the initial step in this direction was taken January 21, 1786, by the Legislature of Virginia when it passed a resolution inviting a meeting of the reputies from all the States and appointing its own delegates for the following among other purposes:

> "To take into consideration the trade of the United States; to examine the relative situations and trade of said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony." V. Elliott 113.

This resulted in the Annapolis Assembly, September, 1786, which assembly passed a resolution drafted by Col. Alexander Hamilton, which recited that the States of New York, Pennsylvania, Delaware and New Jersey had met at Annapolis on a similar call as that in the Virginia resolution, *supra*, and decided that the power to regulate trade was so intertwined with other matters that to effectively adjust this would mean a remaking of the Federal machinery, and took steps which resulted in the meeting of the convention which formed our present Constitution.

Even when the constitutional convention assembled there was strong opposition to the surrender of power to the General Government to regulate commerce.

General Pinckney's proposed draft of the Constitution provided:

> "All laws regulating commerce shall require the assent of two-thirds of the members present in each house." V. Elliott 130, bottom of page.

This was steadfastly insisted upon. Finally the two-thirds provision was surrendered and several restrictions upon this power appear in the Constitution as follows:

> "All duties, imposts and excises shall be uniform throughout the United States." Art. I, Sec. 8, Cl. 1.
>
> "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year One Thousand Eight Hundred and Eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person." Art. I, Sec. 9, Cl. 1.
>
> "No tax or duty shall be laid on articles exported from any State." Art. I, Sec. 9, Cl. 5.
>
> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another." Art. I, Sec. 9, Cl. 6.

The concessions that allowed representation in Congress based on counting three-fifths of the slaves and that provided direct taxes on the same basis helped bring about the compromise of doing away with the two-thirds requirement in the regulation of commerce.

The propositions offered the convention which finally formed themselves into this clause of the Constitution as reported by Madison are as follows:

> "Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of

their constituents, that, under the power of regulating trade, the general Legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat: as vessels belonging or bound to Baltimore to enter and clear at Norfolk, etc. They moved the following proposition:

"'The Legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another.'

"Mr. Gorham thought such a precaution unnecessary; and that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States, without being required to enter, with the opportunity of landing and selling their cargoes by the way.

"Mr. M'Henry and Gen. Pinckney made the following propositions:

"'Should it be judged expedient by the Legislature of the United States, that one or more ports for collecting duties or imposts, other than those ports of entrance and clearance already established by the respective States, should be established, the Legislature of the United States shall signify the same to the executives of the respective States, ascertaining the number of such ports judged necessary, to be laid by said executives before the Legislatures of the States at their next session; and the legislature of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any State, except the Legislature of such State shall neglect to fix and establish the same during their first session to be held after such notification by the Legislature of the United States to the executive of such State.

"'All duties, imposts and excises, prohibitions or restraints, laid or made by the Legislature of the United States, shall be uniform and equal throughout the United States.'" V. Elliott, 478, 479.

These propositions were referred to a committee which reported the following insertion:

"Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear or pay duties in another; and all tonnage, duties, imposts, and excises laid by the Legislature shall be uniform throughout the United States." V. Elliott 483, 484.

This report was ordered to lie on the table.

The three distinct propositions embraced here were taken up as three separate propositions, as shown at V. Elliott 502-3, as follows:

"On the question to agree to the following clause, to be inserted after Article 7, Sec. 4:

"'Nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another.'

"Agreed to, *nem. con.*

"On the clause,—

"'or oblige vessels bound to or from any state to enter, clear or pay duties, in another.'

"Mr. Madison thought the restriction would be inconvenient, as in the river Delaware, if a vessel cannot be required to make entry below the jurisdiction of Pennsylvania.

"Mr. Fitzsimmons admitted that it might be inconvenient, but thought it would be greater inconvenience to require vessels bound to Philadelphia to enter below the jurisdiction of the State.

"Mr. Gorham and Mr. Langdon contended that the government would be so fettered by this clause as to

defeat the good purpose of the plan. They mentioned the situation of the trade of Massachusetts and New Hampshire, the case of Sandy Hook, which is in the State of New Jersey, but where precautions against smuggling into New York ought to be established by the General Government.

"Mr. M'Henry said, the clause would not screen a vessel from being obliged to take an officer on board, as a security for due entry, etc.

"Mr. Carroll was anxious that the clause should be agreed to. He assured the House that this was a tender point in Maryland.

"Mr. Janifer urged the necessity of the clause in the same point of view.

"On the question for agreeing to it,—

"Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, aye, 8; New Hampshire, South Carolina, no, 2.

"The word 'tonnage' was struck out, *nem. con.*, as comprehended in 'duties'.

"On the question on the clause of the report,—

"'and all duties, imposts and excises, laid by the legislature, shall be uniform throughout the United States,'—

"it was agreed to, *nem con.*"

The convention voted to annex the clause "but all such duties, imposts and excises, shall be uniform throughout the United States" to the power of taxation (V. Elliott 543) so it is separated from the other two propositions, which latter are given their present and final wording and location in the Constitution as recorded by Madison at V. Elliott 545.

While this clause of the Constitution is not shown by the records to have been adopted to counterbalance the relinquishment of the proposed requirement of a two-thirds vote on acts regulating commerce, as pointed out

by Mr. Curtis at page 521 of Vol. I of his Constitutional History of the United States, to properly consider this provision it is necessary to recur to the previous struggles on questions of control of commerce.

It would seem that the States in their opposition to surrendering the power to regulate commerce feared a statute general in terms but which by virtue of the varying products in each State might operate differently. (See Curtis Constitutional History, Vol. I, p. 497, for discussion of clause of Constitution forbidding tax on exports.) Still further it must have been from their contemplation that they were surrendering a power to pass a statute operating by its very terms by States as does the Reed Amendment.

The following quotation is taken from The Federalist No. XIV, ascribed to Madison (Dawsons' Federalist, p. 86):

> "In the first place it is to be remembered that the general Government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provision of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. ° ° °"

We have no verbatim account of all the discussions in the convention. Madison's records show the reasons for the Maryland delegates demanding that vessels be not required to clear in another State than that to which they were bound, or from which they were going. He, however, does not record the peculiar situation which the dele-

gates foresaw and sought to meet by their requiring uniform tax laws and no preference of ports of States in regulation of commerce. We are left, therefore, in the matter of interpretation, first, to the words in the instrument itself; secondly, to a historical setting showing a reluctant surrender to the National Government of power to regulate commerce among the States to the extent only that such power was necessary to make uniform laws.

It is but natural that the States, lately colonies, who knew the power of commerce as an offensive and defensive weapon, should seek a limitation on their newly created sovereign which would prevent it from passing statutes whose very terms excluded their operation from a part of the States.

Let us revert to the original proposition of Messrs. Carroll and Martin, "nor shall any privilege or immunity be granted to any vessel on entering * * * one State in preference to another." Under the terms of the Reed Amendment vessels carrying a man with a quart of intoxicating liquor in his pocket had at the time of the indictment in this case the privilege of landing that passenger in Kentucky but not in Indiana. They were granted immunity in the ports of Kentucky and punished in the ports of Indiana, though the landing of the man in Indiana was no violation of the law of Indiana.

It may also be noted that the proposition of Mr. M'Henry and General Pickney, *supra*, provided:

> "All duties, imports and excises, prohibitions or restraints, laid or made by the Legislature of the United States, shall be uniform and equal throughout the United States."

For some reason the word "uniform" was finally ap-

plied to taxes and "no preference" was applied to regulations of commerce and revenue.

It is apparent that the Webb Kenyon law was a complete release of the regulation of intoxicating liquors to the States restoring the States to their pre-constitution status with reference to intoxicating liquors. It was a declaration that intoxicating liquors were not commodities demanding protection and general regulation by the National Government, the only kind of regulation the Federal Government was authorized to make.

The Webb-Kenyon law operated uniformly. As its title declared it divested intoxicating liquors everywhere of their interstate character, while the Reed Amendment itself expressly excludes its operation from liquor for certain States. The different effects in different States under the Webb-Kenyon law is the difference created by the States permitted under a uniform Federal law uniformly divesting all intoxicating liquors of their interstate character, while the Reed Amendment by its terms lacks uniform application because it provides it shall not operate as to a state unless such a state forbids sale or manufacture of intoxicating liquors for beverage purposes. The Webb Kenyon law is uniform. The Reed Amendment is therefore sectional, preferential and not uniform.

In the one instance the local restriction as to intoxicating liquors is that of the local Legislature of the State permitted to exercise an inherent power; in the other instance the local restriction is that of the Legislature of the General Government not authorized by the Constitution. The Constitution requires no preference of States and uniformity as to acts by the General Legislature. It

is one thing to uniformly release to all the States power to regulate a certain commodity in interstate commerce and quite another thing for Congress itself to attempt to make regulations, the terms of which apply to some States but not to all States. Congress has power to declare certain things are matters of local regulation, but it cannot locally regulate them.

The sustaining therefore of the Webb Kenyon law lends no support to such law as the Reed Amendment.

There is a question also whether the Reed Amendment operates only in States which at the time of its passage prohibited the manufacture or sale of intoxicating liquors for beverage purposes or whether it operates in States subsequently passing such laws or would cease to operate in a State repealing such laws.

The following cases would argue that the States in which it would be operative would be limited to the class having such laws at the time of the enactment of the Reed Amendment.

Hollister vs. U. S., 145 Fed. 773;
U. S. vs. Paul, 6 Pet. 141; 8 L. Ed. 348.

If this be true the preference is more marked. If the opposite be true Congress in addition to the preference created has placed an impediment upon the freedom of the State Legislatures.

The Eighteenth Amendment and the legislation enforcing it cover the entire field of liquor regulation so that if the Reed Amendment is not actually repealed it is at least superseded. I can think of no acts in violation of the Reed Amendment which, if committed now, would not be a violation of the Volstead act. The Reed Amendment is there-

fore of no importance in so far as it may be considered henceforth an instrument in aid of or in disparagement of prohibition. However, these plaintiffs in error are in position to assert their objections to its constitutionality because a judgment under this statute has been entered against them, depriving them of their liberty.

Nor should the fact that prohibition of intoxicating liquors has since become embodied in our Constitution affect the constitutionality of the Reed Amendment any more than the rejection of the constitutional amendment would have affected this question. Whether legislation such as the Reed Amendment is to be approved by this court is of general importance so that Congress may understand how far it can go in enacting partial, sectional and preferential legislation on questions that may in the future be brought before it as the liquor question has been before it in the past.

Our attack upon this act is based upon its structure. Congress has never before framed such an act. In its attempt to frame this one it should at the threshhold of such a specie of legislation be held to the exercise of its proper constitutional authority. The question is not solely whether a particular enforcement of the Reed Amendment is within the authority of Congress, but the main question is, has Congress passed a statute whose terms are without its Constitutional authority? If so, and if those terms are not separable from the rest of the act, the entire act is void. We contend the entire act is void because the void can not be separated from the valid part of the amendment without writing a new act. The Reed Amendment is framed to enforce in a State which has enacted a regulation either of manufacture or sale a

stricter prohibition than the State statutes necessarily provide and stricter than they do in fact provide. This statute therefore is not the exercise of any constitutional power of Congress.

To cut off from States that have forbidden either the manufacture or sale of intoxicating liquors and preserved the right to personally use intoxicating liquors within its borders, as Mr. Justice McReynolds said in the Hill case, supra:

> "Is a direct intermeddling with the State's internal affairs. Whether regarded as reward or punishment for wisdom or folly in enacting limited prohibition, the amendment so construed, I think goes beyond Federal power; and to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the several States."

The Hill case was decided by this court January 13, 1919, and was before the trial court at the time of its initial ruling on the constitutionality of this act, on demurrer March 11, 1919 (R. 5-8), and all subsequent rulings thereon.

It is submitted that the Reed Amendment is void by virtue of the particular provisions of the constitution herein pointed out, is in violation of the tenor of the whole Constitution and contravenes the fundamental principles which formed the basis of the Union.

POINT III.

THE REED AMENDMENT DOES NOT DESCRIBE AN OFFENSE.

The Reed Amendment purports to make it an offense to cause intoxicating liquors to be transported. The transportation itself is not by the terms of the act made unlawful. The question therefore is whether the causing of a lawful thing can constitute an offense. Causing is in the nature of aiding and abetting an act. At common law if the principal actor was not guilty of an offense the accessory was not. On this analogy it would seem, therefore, that a statute which purports to punish the causing of a lawful thing is void as a criminal statute because it does not describe an offense. Likewise the indictment which charges the causing of a lawful thing does not state an offense.

Perhaps it should be recalled that the Reed Amendment purports to make it an offense to "order, purchase or cause intoxicating liquors to be transported in interstate commerce, * * * ."

If one should merely order or purchase intoxicating liquors to be transported in interstate commerce, it is exceedingly doubtful whether punishment of such acts is within the competency of Congress.

Collins vs. U. S., C. C. A. 5th Circuit, 263 Fed. 657.

The word "cause" being a general word following the particular words "order" and "purchase" by the rule of *ejusdem generis* and *noscitur a sociis* means a causing of the nature and kind as ordering and purchasing.

In the case of *U. S. vs. Bevans*, 3 Wheaton 336, 4 L. E. 404, the question was, whether a murder committed on board a man-of-war, by a marine in the Boston Harbor could be punished in the United States Court there under a statute providing for punishment of such an offense, if committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district or country under the sole and exclusive jurisdiction of the United States."

Chief Justice Marshall, who wrote the opinion, observed that the power of the Government to punish the defendant for this offense is a proposition never to be questioned, but that the inquiry in this case was not the power of Congress, but the extent to which it had been exercised. On this point Chief Justice Marshall said, page 390:

> "The objects with which the word "place" is associated are all in their nature fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this character. When the sentence proceeds with the words 'or in any other place or district of country under the sole and exclusive jurisdiction of the United States,' the construction seems irresistible that by the words 'other place,' was intended another place of similar character with those previously enumerated and with that which follows. Congress might have omitted in its enumeration some similar place within its exclusive jurisdiction which was not comprehended by any of the terms employed, to which some other name might be given, and therefore the words 'other place' or 'district of country' were added, but the context shows the mind of the Legislature to have been fixed on territorial objects of a similar character."

The court held the murder was not cognizable in the United States Circuit Court of Massachusetts.

In the case of *Reiche vs. Smythe*, 80 U. S. (13 Wall.) 162, 20 L. E. 566, the question was whether birds were included in a custom statute reading "all horses, mules, cattle, sheel, hogs, and other live animals," the court observing that the general term "other live animals" was broad enough to include birds, construed the language not to include birds, for two reasons, 1st, because the statute should be construed in *pari materia* with another statute; and, second, because of the doctrine of *ejusdem generis*, and said at page 165:

> "If it be used in a different sense in the act of 1866 (the one quoted from supra) its meaning, instead of being extended, is narrowed, for all animals not *ejusdem generis* with horses, mules, cattle, sheep and hogs, are excluded from the operation of the revenue laws."

In the case of *Sarlls vs. U. S.*, 152 U. S. 570, 14 S. Ct. 720, it was held that beer is not included in the words "spirituous liquor or wine."

In the case of *Hollender vs. Magone*, 149 U. S. 586, 13 S. Ct. 932, it was held that the phrase in the custom laws "wines, liquors, cordials, or distilled spirits" does not include beer.

The case of *U. S. vs. Celluloid*, 82 Fed. 627, C. C. A. 6 C., was heard before Judges Taft and Lurton, Circuit Judges, and Judge Clark, District Judge. The opinion was by Judge Lurton, and the question was, whether goods should be forfeited when fraudulently entered at a port by a trespasser. Judge Lurton, at page 635, said:

> "But it is said that by the ninth section of the Act of June 10, 1890, it is provided that if any 'owner, importer, consignee, agent, or other person' do in respect to the goods seized any of the forbidden things,

> a forfeiture results and that if Elliott was neither the owner, nor the consignee, importer or agent, he is included in the words 'other person.' These words 'other person' appeared in the same connection in the twelfth section of the act of 1874. The descriptive words preceding all describe some person having a relation to the owner, and for whose conduct in respect to his merchandise he may be responsible. The words 'other person,' when a forfeiture of merchandise is sought, mean some one of the same general class as those described by the words with which it is associated. The rule '*noscitur a sociis*' has application * * *."

The case of *Newport, etc., vs. U. S.*, C. C. A., 61 Fed. 488, was another before Judges Taft and Lurton, circuit judges, and Judge Key, district judge. It involved the construction of the 28-hour law, providing a penalty for confining animals over 28 hours "unless prevented by storm or other accidental causes." The opinion was by Judge Lurton, who said, at page 490:

> "The meaning of the general words, 'other accidental causes,' must be ascertained by referring to the preceding special words. The rule, '*noscitur a sociis*' is clearly applicable. A storm is unavoidable in the sense that it can not be prevented. 'Other accidental causes' must be taken to mean other unavoidable accidential causes."

The case of *Western, etc., Co. vs. Heldmaier*, 111 Fed. 123, was one in which the Circuit Court of Appeals for the Seventh Circuit construed the Act of June 5, 1900, which permitted allowance and signing of a bill of exceptions by another judge when the one before whom the cause was tried was 'by reason of death, sickness or other disability'

unable to sign the same. During the course of the opinion the court, at pages 124 and 125, respectively, said:

> "It is an accepted canon in the construction of statutes that 'when particular words are followed by general ones, the latter are to be held to apply to persons and things of the same kind as those which precede.' * * * The term 'other disability' means disability of like character to death or sickness, not a disability arising from temporary absence from the district or circuit."

Furthermore the word "cause" is frequently used in contra distinction to the word "effect". Assuming the "effect" to be a shipment in interstate commerce which Congress could prohibit, does Congress have the constitutional authority to punish "causing" alone, and, if it has such authority, does an act so written describe an offense? Is such an act due process within the meaning of the Constitution? It is true that certain acts otherwise only within the competency of the States to punish, become punishable by Congress because they aid and abet in the commission of a substantive offense defined and made punishable by Congress. But where Congress has failed to define and punish the substantive offense its attempt to define and punish acts in aid of a lawful substantive act would seem to be a nullity.

If the Reed Amendment should be construed as prohibiting the transportation itself then the indictment is insufficient because it follows merely the words of the statute and not its legal effect.

It should also be remembered that regulation of intoxicating liquors was a regulation of acts malum prohibitum, and not malum in se. For this reason also an offense

would not be described by a statute which purports to punish acts aiding and abetting an act which is only unlawful because prohibited by statute when such act is not in fact prohibited by statute.

The crime attempted to be defined by the Reed Amendment is not a common law offense. It must therefore be distinctly and clearly defined by statute. Can Congress properly describe a criminal offense which depends upon the legislative acts of another distinct sovereignty for its complete definition and its going into effect? We can find no decision in which this question is determined, but feel that it is a very pertinent question attacking the fundamental principle of the act in question, and we desire to submit it to the judgment of this court for opinion.

The same section which contains the Reed Amendment also provides against sending advertisements of intoxicating liquors into states forbidding advertisements or solicitations of liquor, and also provides that the Postmaster General is directed to issue public notice containing the names of States in which it is unlawful to advertise, or solicit orders for, such liquors. However no provision is made as to informing people what States forbid the manufacturing or sale of intoxicating liquor, nor does the statute expressly require that knowledge that a State forbids manufacture or sale of intoxicating liquors is an element of the offense. The statute is therefore lacking in essential elements as a criminal statute in these respects.

POINT IV.

Misjoinder of Misdemeanor and Felony.

The first three counts of this indictment in this cause charge misdemeanors. The fourth charges a felony. At common law the indictment was demurrable because of such joinder. We know of no case in this court decisive of the question here raised by demurrer.

POINT V.

The Word "or" is Indefinite.

The indictment in each count charges that, "the laws of the latter state (Indiana), then and there prohibited the manufacture or sale therein of intoxicating liquors." This is not an averment that the manufacture was prohibited. It is not an averment that the sale was prohibited. The indictment should have averred the fact definitely. If only one was prohibited an averment to that effect would have been sufficient, if both were prohibited the conjunctive "and" should have been used. An averment that a thing is black or white, is not an averment that it is black, nor is it an averment that it is white. The universal rule in criminal pleading is that where the disjunctive is used in a statute, definiteness required in criminal pleading necessitates that such terms should be joined by the conjunctive "and"

State vs. Sarlin (Supreme Court of Indiana), 123 N. E. 800, Point 4;

Young vs. State, Supreme Court of Indiana, 124 N. E. 679;

Ackley vs. U. S., C. C. A., 8th Circuit, 200 F. 217, Points 1 and 2.

POINT VI.

THE INDICTMENT DID NOT APPRISE PLAINTIFFS IN ERROR WHOM THEY CAUSED TO TRANSPORT THE INTOXICATING LIQUORS AVERRED.

The case of *United States vs. Simmons*, 96 U. S., page 360, 24 L. Ed., page 819, was one where there was a count in the indictment quoted in the following excerpt from the opinion in that case: (Quotation begins p. 362.)

> The second count, pursuing the words of section 3266 of the Revised Statutes, charges that the defendant 'Did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain building and on certain premises where vinegar was manufactured and produced, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided.'"
>
> "Under this count we are asked the following questions: First, whether it is sufficient, in an indictment drawn under that portion of the section which prohibits the use of a still, boiler or other vessel for the purpose of distilling, in any building or on premises where vinegar is manufactured or produced, to charge the offense in the words of the statute. Second, whether the omission of an averment that the distilling there referred to was of alcoholic spirits is a valid objection to the count.

"The first question is answered in the negative.

"Where the offense is purely statutory, having no relation to the common law, it is, 'As a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., Sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.

"Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler and other vessels himself, but only with causing and procuring someone else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment."

The indictment in that case read substantially the same as the indictment in the first three counts in this case. It charged that the defendant caused and procured a still to be used in violation of law just as this indictment charges that the defendants caused intoxicating liquors to be transported. Justice Harlan in that case held that that count of the indictment was void because it did not state whom it was the defendant caused to do the act complained of. Likewise, in this case, these defendants are not informed whom, it was they caused to transport intoxicating liquors.

or that the name of such person is unknown to the grand jurors.

The indictment in the Simmons case and this indictment are, therefore, parallel, and the fourth count of the indictment in this case is likewise void, because it does not state whom the defendants conspired to cause to do the acts complained of or that the name of that person was unknown to the grand jurors.

See also

Miller vs. U. S., C. C. A., 7th Circuit, 136 Fed. Rep. 581.

POINT VII.

The word "cause" should have been defined to the jury as the proximate cause, because that seems to be the causal agent which the statute attempts to reach rather than an incidental cause.

POINT VIII.

The jury should have been instructed expressly that it was not the duty of the plaintiffs in error, or either of them, to take positive steps to prevent Harry Hudson from violating the law.

POINT IX.

The first three counts of the indictment charge that the defendants, on September 20, 23 and 26, 1918, respectively, caused a quantity of whiskey to be transported in interstate commerce from Cincinnati, Ohio, to Indiana. To make this case the prosecution produces as its main witness, the co-defendant, Harry Hudson, who April 10, 1919,

pleaded guilty (R. 8-9) and who April 25, 1919, the day of the trial of these plaintiffs in error was released on his own recognizance in the sum of $100.00 to appear before the court on the first day of the next term and from day to day and term to term thereafter. (R. 9.)

Hudson's testimony (R. 40-48) is set forth in condensed form in the statement of the case in this brief. The gist of his testimony as to the September 20, 1918, transaction is that he, at the direction of Willis D. Williams and Willis D. Williams, made their first trip to Cincinnati by automobile, each loaded whiskey in their respective automobiles. Willis D. Williams said he was going to Indianapolis with his. On the way to Cincinnati, Willis D. Williams pointed out to Hudson a vacant lot just outside of Indianapolis, where he said Azel Williams would meet him on his return. Hudson returned to this lot with whiskey where he met Azel who exchanged cars with Hudson and Hudson does not know what became of the whiskey.

His testimony, which the prosecution attempts to apply to the second count, was in brief that Willis D. Williams three or four days after the first trip sent Hudson, Wright and Tribby, each in a separate car, to Cincinnati after whiskey. Willis D. Williams told him to leave this whiskey at a place on Raymond St., Indianapolis, that Azel pointed out to him the morning he left for Cincinnati. Hudson did this.

The gist of Hudson's statement as to the transaction averred in the third count is that three or four days after the second trip Mr. Williams sent him to Cincinnati for some whiskey. On this trip, Wright, Williams and possibly also Tribby were along. They loaded the whiskey

and Hudson started back. For no reason that he can assign (R. 43) he stopped his machine by a woods and there was Azel. He and Azel exchanged machines and Hudson does not know what became of this whiskey. There had been no previous meeting at this point. No arrangement to meet there and Hudson did not know Azel was there, but Hudson just stopped at the exact point where Azel was.

The October 3rd transaction was testified about because of its materiality under the fourth count which was nolled during argument. (R. 63.)

A reviewing court will in the exercises of sound discretion reverse a criminal case whether an error is formally presented by the record if there has been a conviction without proper evidence to support it.

In *Sykes vs. U. S.*, 204 Fed. Rep. 909, at page 913 of the opinion, the court said:

> "And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime contradicted under oath by herself, contradicted by other witnesses' and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it."

FACTS TO BE CONSIDERED IN CONNECTION WITH THE TESTIMONY OF HARRY HUDSON.

1. He told the police and testified under oath in the police court that Williams knew nothing about the liquor (the Oct. 3, transaction) and had nothing to do with it. (R. 46.)

2. Hudson, without Williams telling him to do so, went over to Westville, Illinois, to get Tierney to claim the liquor in the possession of Hudson at the time of his arrest. (R. 44.)

3. Hudson telephoned Tierney and when Tierney came to Indianapolis, although Hudson told Williams when Tierney arrived, Hudson and not Williams met Tierney, waited upon Tierney at his hotel. (R. 44.) Hudson admits he was guilty of perjury in the police court and also guilty of attempting to suborn Tierney.

4. Williams testified in police court he had nothing whatever to do with the whiskey. (R. 47.)

5. Hudson worked for Williams for only eight days before he claims Williams directed him to violate the law. (R. 40.)

6. Hudson hauled no liquor for Williams after October 3, 1918. (R. 44.)

7. Did October 3, 1918, conclude the violation of this law by Hudson? (R. 46.)

8. When Hudson was asked about other trips where plaintiffs in error had taken the number of cars used by Hudson in hauling liquor, did he manifest the same willingness to tell about those transactions that he displayed in his picturesque testimony about plaintiffs in error? He appealed to the court to be relieved from going into those transactions. (R. 45.)

9. Although he hauled liquor for Burdeck three or four times (R. 46) from Cincinnati in the State of Ohio to Indiana, as many times as he claims he hauled in this case, he was not arrested for the Burdeck transactions. (R. 47.)

10. He was allowed to take a car and go wherever he pleased so long as he turned in seventy-five per cent of the proceeds, at rates fixed by the office. (R. 47.) He admits he was paid twenty-five per cent of the rate charged for taking a passenger to Cincinnati. (R. 45.)

11. On his second, third and fourth trips, Hudson testified Wright took a car along with him and got whiskey. Wright was not produced by the prosecution, nor his absence accounted for.

12. On his second and third trips Hudson testified Tribby took a car along with him and got whiskey. Tribby was produced as a witness for the prosecution (R. 48) and said he never made any trips at Mr. William's direction or order for the purpose of hauling whiskey for him.

13. One time when Tribby had taken a car to Cincinnati he met Hudson there and Hudson asked Tribby not to tell Williams that he saw Hudson there. (R. 49.) Hudson had with him a foreign looking person (R. 50), who went with Hudson to a warehouse. This time Hudson had with him a wirewheeled car such as Tribby had never seen around the Williams Auto Company. (R. 50.) This was the only time Tribby was ever in Cincinnati with Hudson. (R. 50.) Williams came back with Tribby and Williams had no liquor in his car. (R. 50.)

14. On his second (R. 41) and fourth trips Hudson testified he dealt with a man named Davies, manager and superintendent of Peoples. Davies was not produced by the prosecution nor was his absence accounted for.

15. Hudson testified he had heard other drivers talking about getting whiskey from Cincinnati. (R. 40.) No such driver was produced by the prosecution.

16. The only time Hudson admits he made a delivery of liquor to any one other than plaintiffs in error was a delivery to a foreigner, who he says is a stranger to him. (R. 48.) He was seen in Cincinnati by Du Bois and by (R. 59) Tribby with a foreigner, when he asked Tribby not to mention it to Williams. (R. 50.) He declined to admit except upon order of the court (R. 45) that he hauled liquor for Nick Burdeck, an Italian. (R. 46.)

17. Carol Du Bois, night manager of the Government Square Garage, at Cincinnati, first called as a witness for the prosecution, and recalled as defendants' witness, testified that the first time he saw Mr. Williams was in September or October, he thinks in October. (R. 55.) Previous to this time someone had been in his garage three or four times representing himself as Mr. Williams. Hudson testified his last trip for Williams was October 3, 1918. This man who was misrepresenting himself as Mr. Williams said he was hauling liquor.

18. Later Mr. Williams asked Du Bois (R. 57) where Peoples was located and asked Du Bois to take the numbers of cars of any people representing themselves as his drivers.

19. The prosecution produced two witnesses from Peoples; John Schmidt (R. 54) receiving clerk, who testified he saw Willis D. Williams in Peoples' store in October, 1918, but did not know what he was there for, and Le Roy Weaver, shipping clerk, who said he saw Willis D. Williams in Peoples' store prior to December, 1918, but did not know him then, had no business with him.

Is there anything incriminating about a man going into a wholesale liquor house in Cincinnati in October, 1918?

Hudson says Williams was with him in September, previous. These clerks who merely saw him walking by did not see Williams in Peoples' store in September. When in October Harry Hudson had been arrested with a load of liquor in his car which he bought at Peoples; when in October Williams learned that someone falsely impersonating him had been hauling liquor; is it any wonder that he in October would ask where Peoples' store was and would go there to investigate. These circumstances or straws, grasped upon by the prosecution, on examination, refute the story of Hudson.

What man of responsibility would not want to notify persons to be on their guard against sales to or dealings with persons falsely representing themselves to be him?

Under all these circumstances it is submitted that the testimony of Harry Hudson should be disregarded entirely.

As to Azel Williams, Hudson's testimony is that all Azel did was to show him the Raymond Street place where Hudson claimed he left liquor with a foreigner and that Azel met him twice outside Indianapolis. How, if this be true, could it be said to show that Azel caused intoxicating liquors to be transported from Cincinnati, Ohio, to Indiana? No other witness mentions Azel Williams. Hudson in planning his story shows some strange circumstances. Take his second trip, Hudson was driving along through the country on his way back to Indianapolis, not expecting to meet Azel. Azel with the lights turned off his car was in a woods, though Hudson did not know this. Hudson stops his car without any signal or other reason at this woods and Azel backs his machine out. Fiction could not be stranger.

POINT X.

THE DEFENDANT IN ERROR FAILED TO PROVE THAT THE INTOXICATING LIQUORS MENTIONED IN THE INDICTMENT WERE NOT CAUSED TO BE TRANSPORTED FOR SCIENTIFIC, SACRAMENTAL, MEDICINAL OR MECHANICAL PURPOSES.

Whether this exception was a matter of defense or whether it was the duty of the defendant in error to show plaintiffs in error without the exception requires a construction of the Reed Amendment. A study of the cases on this subject is not helpful except as such cases exemplify the rule of law that is to be applied.

The general principles of law on this question are set forth in *U. S. vs. Cook*, 17 Wall. 168, 21 L. Ed. 538. The following are quotations from that opinion, at pages 173, 175, and 180, respectively:

> "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. * * *
>
> "Where the exception itself is incorporated in the

general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception in the general clause is negatived in pleading the clause no offense or no cause of action will appear in the indictment or declaration when compared with the statute or contract; but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negativing the exception or proviso, as a prima facie case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense.

"Labor and traveling on the Lord's day, except from necessity and charity, are forbidden in some states by statute, which also furnishes an example where the exception is a constituent part of the offense, as it is not labor and traveling, merely, which are prohibited, but unnecessary labor and traveling or labor and traveling not required for charity. *State v. Barker*, 18 Vt. 195.

"Innkeepers are also prohibited by statute, in some jurisdictions, to entertain on the Lord's day persons, not lodgers in the inn if residents in the town where the inn is kept, and an indictment founded on that statute was held to be bad, because it did not aver that the persons entertained were not lodgers, as it is clear that that circumstance was an ingredient of the offense. *Com. v. Tuck*, 20 Pick. 361."

In the case of *U. S. vs. Britton*, 107 U. S. 655, 2 S. Ct. 512, at the last two pages of the opinion this court again lays down the rule as to exceptions (beginning p. 669):

"* * * It is not every purchase of its own shares by an association that is forbidden. The very section (5201) and sentence of the statute which declares that no banking association shall be a purchaser of its own shares, contains the exception,

'unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.' This exception should have been negatived in these counts. The rule of pleading, as laid down by Mr. Chitty, is that 'when a statute contains provisos and exceptions in distinct clauses it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. On the contrary, if the exceptions themselves are stated in the enacting clause it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute., 1 Chit. Crim. Law 283, 284.

"Thus, where a statute declared that if one on the Sabbath day 'shall exercise any secular labor, business, or employment except only as works of necessity and charity, he shall be punished,' etc., a negative of the exception was held indispensable. * * *

"The failure of the counts under consideration to aver that the purchase of the shares of the association was not necessary to prevent loss upon a debt previously contracted in good faith is a fatal defect. These counts merely charge that the defendant wilfully misapplied the funds of the association, and then aver a use of the funds, which from all that appears to the contrary, was a perfectly lawful application of them. * * *

The Reed Amendment is as follows:

"Whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State."

Tested by the rules and examples set forth in the preceding quotations from opinions by this court it seems plain that it is not merely intoxicating liquors which this statute forbids to cause to be transported into a State, but it is intoxicating liquors except for scientific, sacramental, medicinal or mechanical purposes. The Reed Amendment is exactly like the example cited in the Cook case, supra, where this court pointed out that where labor and traveling on the Lord's day except from necessity and charity is forbidden, the exception is a part of the offense as it was not labor and traveling merely which are prohibited but unnecessary labor and traveling or labor and traveling not required for charity. So all intoxicating liquors are not prohibited by the Reed Amendment but merely liquors for other than scientific, sacramental, medicinal or mechanical purposes. The defendant in error in drafting the indictment in this case realized that this was the law and averred in the indictment in this case, "said intoxicating liquors not being so transported for scientific, sacramental, medicinal or mechanical purposes," but in the trial offered no evidence to support this averment. Neither of these plaintiffs in error testified and it is the law that this fact is not to be considered against them.

In the case of *Coffin vs. U. S.*, 156 U. S. 432, 15 S. Ct. 394, 405, this court said in the sixth paragraph of the opinion from the last:

> "In addition we think the twenty-second exception to the rulings of the court was well taken. The error contained in the charge which said substantially, that the burden of proof had shifted, under the circumstances of the case, and that, therefore, it was incumbent on the accused to show the

> lawfulness of their acts, was not merely verbal but was fundamental, especialy when considered in connection with the failure to state the presumption of innocence."

In the case of *Davis vs. United States*, 160 U. S. 469, 16 S. Ct. 353, at about the middle of the opinion, this court said (p. 487):

> "Strictly speaking, the burden of proof as those words are understood in Criminal law is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime."

Would the defendant in error concede in this case that if plaintiffs in error had taken the stand and testified that the intoxicating liquors mentioned in this case had been brought in for scientific, sacramental, medicinal or mechanical purposes defendant in error would have been helpless because it had no evidence on this point and that plaintiffs in error so testifying would have compelled the trial court to instruct the jury to find for them? Can it be that where the defendant in error has failed to offer any evidence on a material ingredient of the offense that a defendant on trial in criminal case has the burden of disproving this material averment in the indictment when he is presumed to be innocent and when the law is that nothing shall be considered against such a defendant because he does not testify?

Suppose plaintiffs in error had taken the stand and denied they had anything to do with causing the transportation of the liquors mentioned in this case or knew anything at all about it, naturally then they knew nothing of

the intoxicating liquor testified about by the witness of defendant in error and could neither affirm or deny that the liquor brought in was for scientific, sacramental, medicinal or mechanical purposes, is it the law of this country that a defendant is to be convicted under such a state of evidence? If the fact that he does not testify is not to be considered against him certainly this rule of law does not mean that a jury can construe his failure to testify as an admission of a material averment in the indictment.

If this conviction can be sustained all talk about the burden of the proof being on the prosecution to prove all the material ingredients of the offense and the presumption of innocence is mere meaningless words. We should understand henceforth, though every court in every jurisdiction in this land almost every day instructs a jury that a defendant on trial in a criminal case is presumed to be innocent, that this is evidence in his favor, that the burden of proving the defendant guilty of all the material ingredients of the offense beyond a reasonable doubt is upon the prosecution, and the fact that a defendant does not testify in his own behalf is not to be considered against him, that this is but empty ceremony calculated to lull an accused person into a false sense of security, for in fact he can be convicted though the prosecution offers no evidence on a material ingredient of the offense, in fact he has the burden of establishing his innocence and if he does not take the witness stand and assume this burden he will be found guilty: beautifully worded safe guards of an accused, developed through the years of the growth of Anglo-Saxon liberty are now in fact obsolete legal literature.

Wherefore it is submitted that for each of the errors

assigned in the record and presented herein the judgment of the Court below should be reversed, vacated and held for naught and each of these plaintiffs in error be discharged or granted such other or further relief as may be proper in the premises.

Respectfully submitted,

MILTON W. MANGUS,
Attorney for Plaintiffs in Error.

APPENDIX.

While the Acts of Indiana and West Virginia may not be required to be set forth, the portions thereof which this court may wish to read are here set forth.

The only act of the Legislature of Indiana which could make the Reed Amendment apply to Indiana is Chapter 4 of Acts of 1917, page 15. The portions thereof deemed material to a consideration of this case are as follows:

> AN ACT prohibiting the manufacture, sale, gift, advertisement or transportation of intoxicating liquor except for certain purposes and under certain conditions.
> (H. 78. Approved February 9, 1917.)
>
> CONSTRUCTION OF ACT.
>
> Sec. 1. Be it enacted by the general assembly of the State of Indiana, That this act shall be deemed an exercise of the police powers of the State, for the protection of the economic welfare, health, peace and morals of the people of the state, and all of its provisions shall be liberally construed for the accomplishment of that purpose.
>
> INTOXICATING LIQUOR DEFINED.
>
> Sec. 2. The words "intoxicating liquor" as used in this act shall be construed to mean all malt, vinous, or spiritous liquor, containing so much as one-half of one per cent. of alcohol by volume, or any other intoxicating drink, mixture or preparation of like nature; and all mixtures or preparations containing such intoxicating liquor, whether patented or not, reasonably likely or intended to be used as a beverage, and all other beverages containing so much as one-half (½) of one per cent. of alcohol by volume.

"PERSON" DEFINED.

Sec. 3. The word "person" wherever used in this act, shall be held and construed to mean and include persons, firms and corporations, and all associations of natural persons incorporated or unincorporated, whether acting by themselves or by a servant, agent or employe.

DATE OF TAKING EFFECT—PROVISIONS FOR LIQUOR IN BOND.

Sec. 4. That after the 2d day of April, 1918, it shall be unlawful for any person to manufacture, sell, barter, exchange, give away, furnish or otherwise dispose of any intoxicating liquor, or to keep any intoxicating liquor with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, except as in this act provided, Provided, however, it shall be lawful for any person who at the time of the taking effect of this act shall then be the owner of or in possession of spiritous, vinous or malt liquors previously manufactured in this state and which liquors so manufactured in this state shall then be under government bond in any bonded warehouse in this state, pursuant to and in compliance with the acts of Congress, and the rules and regulations lawfully established in relation thereto, to have, and keep in possession all such liquors until disposed of in the usual course of trade in original package or bottled in bond for shipment out of the state into states wherein the manufacture, sale or possession of liquor is not prohibited by law during such time and period as may be allowed by the laws of the United States, and any lawful rule or regulation adopted pursuant thereto, to tax pay such liquors: Provided further, such liquors shall not be kept or held with intent to sell, barter, give away or use within the State of Indiana, nor actually sold, bartered, given away or used within the State of Indiana. Any person violating this sec-

tion, upon conviction, shall be fined not less than one hundred ($100.00) dollars and not more than five hundred ($500.00) dollars, and imprisoned in the county jail for not less than thirty (30) days nor more than six (6) months, for the first offense, and shall be fined not less than two hundred ($200.00) dollars nor more than five hundred ($500.00) dollars and imprisoned in the county jail not less than sixty (60) days nor more than six (6) months for the second or any subsequent offense.

MANUFACTURE FOR DOMESTIC USE NOT PROHIBITED.

Sec. 5. The provisions of this act shall not be construed to prohibit any person from manufacturing, for his own domestic consumption wine or cider; or to prohibit the manufacture of vinegar and non-intoxicating cider for use or sale; or to prohibit the manufacture and sale of pure grain alcohol for medicinal, scientific or mechanical purpose, or wine for sacramental purposes as herein provided, or to prohibit the manufacture and sale of denatured alcohol. Nor shall it prohibit a wholesale druggist from selling pure grain alcohol in quantities of not less than one (1) gallon at a time to any registered pharmacist holding a permit as herein provided, or to the officer of any public or charitable hospital or to any medical or other college, for medical, mechanical or scientific purposes, and only upon the written and signed application of such officer, as provided in this act. Nor shall this act be construed to prohibit a person from giving intoxicating liquor to a guest in his own home which is not a place of public resort, or to prohibit a registered pharmacist, if licensed and bonded as provided in this act, from selling certain intoxicating liquor for medicinal purposes upon the prescription of a licensed physician, or for sacramental purposes, upon the order of a clergyman, or from selling alcohol for mechanical or chemical purposes only, as herein provided.

RECEIVING LIQUORS FROM COMMON OR OTHER CARRIERS.

Sec. 15. After the second day of April, 1918, it shall be unlawful for any person in this state to receive directly or indirectly intoxicating liquors from a common or other carrier or for any person in this state to possess intoxicating liquors, received directly or indirectly from a common or other carrier in the state, except that such liquors have been received from such common carrier by a person holding a permit to receive intoxicating liquors, excepting also to clergymen using wine for sacramental purposes as provided for in this act.

TIME WITHIN WHICH TO COMPLY WITH THIS ACT.

Sec. 35. Within ten (10) days after the date when this act has become operative every person except licensed pharmacists, wholesale druggists, manufacturing chemists or public hospitals shall remove or cause to be removed all intoxicating liquors in his possession from the state and failure to do so shall be prima facie evidence that such liquor is kept therein for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this act: Provided, however, That this section shall not apply to alcohol kept for chemical or manufacturing purposes, or to one (1) gallon of intoxicating liquor, other than beer, or twelve (12) quarts of beer or all wine manufactured for his own domestic consumption kept in his own home for domestic use, held by an individual; and provided, further, that any licensed pharmacist, wholesale druggist, manufacturing chemist or public hospital shall report to the clerk of the circuit court within said ten (10) day period the kinds and amount of intoxicating liquor on hand.

The following Indiana cases hold that Section 35 does

not state a public offense but merely makes failure to remove liquors prima facie evidence that liquors were kept to violate Sec. 4 of the act.

Reed vs. State, 126 N. E. 6. (Record shows 12 quarts of whiskey possessed.)

Blomberg vs. State, 125 N. E. 399. (Record shows over 100 gallons whiskey, gin, wines and beer possessed.)

Ward vs. State, 125 N. E. 397. (Record does not show quantity of liquor.)

Section 31 of the West Virginia statute, passed Jan. 31, 1917, approved February, 1917, being the one cited by the trial judge in the Dan Hill case, is as follows:

> "It shall be unlawful for any person to bring or carry into the State, during any period of thirty consecutive days, or carry from one place to another within the state, in any manner, whether in his personal baggage, or otherwise, more than one quart of intoxicating liquors for personal use. If any person shall bring, or carry into the state, during any period of thirty consecutive days or from one place to another within the state, in any manner, whether in his personal baggage, or otherwise, more than one quart of intoxicating liquors for personal use, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months. And upon conviction of the same person for the second offense under this act, he shall be guilty of a felony, and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charges made by the grand jury is the first or sec-

ond offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial.

"It shall be unlawful for any carrier operating in this state to knowingly carry for a passenger, or knowingly permit a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage. But nothing contained in this section shall be construed as requiring a carrier to carry, or permit a passenger to carry into the state, or from one place to another in the state, any intoxicating liquors as personal baggage. If any carrier shall knowingly carry for a passenger or knowingly permit a passenger to carry in to the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, the carrier shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than two hundred nor more than one thousand dollars. And a court of equity upon showing that a carrier has knowingly carried for a passenger, or knowingly permitted a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, or through the want of due caution and care has carried for a passenger, or permitted a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, shall have jurisdiction to entertain such suit and to enter such decree and take such proceedings as are provided for in section seventeen." Acts W. Va., 1917, p. 183.

February 20, 1919 (subsequent to the decision of Dan

Hill case by this court), the West Virginia Legislature re-enacted Sec. 31 as follows:

> "It shall be unlawful for any person to bring or carry into the state, during any period of thirty consecutive days or carry from one place to another within the state, or to have or carry in or on any passenger train or other vehicle of conveyance, within said period, in any manner whatsoever, whether in his personal baggage or otherwise, more than one quart of intoxicating liquors, whether such liquors are intended for personal use or for any other purpose, and whether or not any such person shall be an intra-state or interstate passenger. If any person shall bring, or carry into the state, during any period of thirty consecutive days, or from one place to another within the state, or shall have or carry in or on any passenger train or other vehicle of conveyance, within said period, in any manner whatsoever, whether in his personal baggage or otherwise, more than one quart of intoxicating liquors, whether the same is intended for personal use or for any other purpose, and whether any such person shall be an intra-state or interstate passenger or not, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months. And upon conviction of the same person for the second offense under this act he shall be guilty of a felony, and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases, to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record of the first conviction as evidence before the trial court of said second offense, and shall not be permitted to use his

discretion in charging said second offense, or in introducing evidence and proving the same on the trial.

"It shall be unlawful for any carrier operating in this state knowingly to carry for a passenger, or for any of its employees, or knowingly to permit any person or employee to carry into this state, or from one place to another within the state, or knowingly to permit any passenger or employee to have or carry in or on any of its trains, more than one quart of intoxicating liquors as baggage. If any carrier shall knowingly carry for a passenger, or knowingly permit a passenger to carry into the state, or from one place to another within the state, or knowingly to permit any passenger or any person in its employ to have or carry in or on any of its trains, more than one quart of intoxicating liquors as personal baggage, the carrier shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than two hundred dollars nor more than one thousand dollars. And a court of equity, upon showing that a carrier has knowingly carried for a passenger or an employee, or knowingly permitted a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, or through the want of due caution and care, has carried for a passenger or employee or permitted a passenger or employee to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, shall have jurisdiction to entertain such suit and to enter such decree and take such proceedings as are provided for in section seventeen." Acts W. Va., 1919, p. 386.

No. 159.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

WILLIS D. WILLIAMS AND AZEL WILLIAMS,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

In Error to the District Court of the United States for the District of Indiana.
(27246.)

ARGUMENT OF PLAINTIFFS IN ERROR AGAINST MOTION TO DISMISS OR AFFIRM.

[Supplemental to Pages 33-80 of Argument in Brief Filed October 25, 1920.]

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[Supplemental to Pages 33-80 of Argument in Brief Filed October 25, 1920.]

On October 25, 1920, the printed brief and argument of plaintiffs in error was served upon the Solicitor General. By letter dated October 26, 1920, the Solicitor General enclosed to me a copy of a motion to dismiss or affirm

which he proposed to file with this court November 22, 1920. As the greater part of what is to be said in opposition to the motion to dismiss or affirm has already been said in our printed brief and argument filed October 25, 1920. these plaintiffs in error most respectfully request the cour to read pages 33-80 of the printed argument in that brief, which considers whether the constitutionality of the Reed Amendment is an open question, and also its constitutionality.

We suggest the argument following herein can be read to better advantage after reading the aforesaid pages of our main brief.

On page two of the motion it is said the contention of the unconstitutionality of the Reed Amendment is "based alone" on Clause 6, Section 9, of Article I of the Constitution. If the Solicitor General had read our brief he would have found that while that clause of the Constitution is relied upon our contention is not based alone on that clause, but on the tenor of the whole Constitution, several other of its provisions being particularly pointed out and relied upon at pages 49-56 of the argument in our main brief.

If the Solicitor General did notice these other provisions of the Constitution and is attempting to claim they are not presented to the court for consideration in this case his position would seem to be that in the Dan Hill case, where, so far as I have been able to ascertain, no constitutional question was presented, where no judgment had been entered against an accused, a few argumentative statements in that opinion finally foreclosed subsequent presentation of any question of the constitutionality of the act, yet where the constitutionality of the same act is di-

rectly assailed in real, vital and earnest controversy after judgment against the accused he would endeavor to limit the grounds of attack.

A reading of the argument presented in our main brief, it is submitted, will disclose:

1. The constitutionality of the Reed Amendment has never been presented to this court.

2. The Dan Hill case did not decide its constitutionality.

3. The Clark Distilling Co. case lends no support to the Reed Amendment.

4. The Reed Amendment is in fact unconstitutional.

On the question of the constitutionality of this act I have endeavored by exhaustive research to analyze the Reed Amendment, point out the fundamental difference between it and the Webb-Kenyon and Wilson acts, bring before the court numerous provisions of the Constitution with which the Reed Amendment is not in harmony, and present to the court a history of the no preference clause.

In this case we are not asking the court to overrule a single one of its decisions.

Mr. Justice McReynolds concurs in the constitutionality of the Webb-Kenyon law, yet is of the opinion the Reed Amendment is unconstitutional. We have endeavored to show that the similarity of the Webb-Kenyon law and the Reed Amendment is only on the surface; that fundamentally they operate differently and are subject to different constitutional tests. For instance, take one of the examples supposed in our main brief at page 57. Congress enacts a law in substance:

> Whereas some of the states have income tax laws, and whereas the United States can, by its broad territorial powers of investigation extending over the entire United States, be of great assistance to such states in furnishing information to such states, be it enacted that an income tax of ten per cent is hereby imposed upon the income of every person residing in such state, which shall be used for general expenses of the United States, and the information gained by the government shall be available to the states.

Is such an act constitutional? If not, what provision of the Constitution does it violate? Such an act impedes legislative freedom of the states and is not uniform. The language in my main argument at page 57 is meant as a repetition of a supposed argument against my contention and is not meant to be an admission that such a statute is in fact uniform.

Our main brief in giving the history of the no preference clause of the Constitution shows the no preference clause of the Constitution and the provision requiring that all duties imposts, and excises shall be uniform, developed out of the same controversy in the constitutional convention. This court, in a very thorough consideration of the same matter gave much of the same history in the case of *Knowlton v. Moore*, 178 U. S. 41, 20 S. Ct. 747. This was a case in which an uniform excise was involved. During the course of the opinion in discussing the no preference clause and the clause requiring excises to be uniform this court said, at page 104:

> "It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to

> duties, imposts, and excises, though couched in different language had absolutely the same significance."

And again at page 105 of that opinion the court said:

> "Thus it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption, they became separated only in arranging the constitution for the purpose of style."

And at page 106 of that opinion the court said:

> "* * * the preference clause of the Constitution and the uniformity clause were in effect, in framing the Constitution, treated, as respected their operation as one and the same thing and embodied the same conception."

Yet it is sometimes said that there is no limitation upon the power of Congress over interstate commerce.

As pointed out in the main brief, the Reed Amendment is without precedent, so we are obliged to consider it from analagous supposititious cases.

Suppose Congress should enact that it shall be unlawful to ship cigarettes into any state whose law forbids their sale to minors. Is such an enactment valid? If not, what provision of the Constitution is violated?

The Webb-Kenyon law restored the states with reference to intoxicating liquors to the same position they were before the Constitution. As was noted in the Clark Distilling Co. case, the law was uniform, it applied everywhere, its different effects were the different effects created liter-

ally by the local laws alone in a particular locality. Not so with the Reed Amendment. Here each of two states may permit liquor to be brought within its borders, but a Federal law keeps it out of one. The Reed Amendment is not a release of power over interstate commerce, but is a federal criminal statute not operating in every state alike, but only in states which forbid manufacture or sale of intoxicating liquors for beverage purposes. It, therefore, lacks geographical uniformity and creates preferences in so far as its provisions partially and locally prohibit in some states, but not in all states, certain things which these states do not themselves prohibit.

The Solicitor General in his argument quotes from the case of *Armour Packing Co. v. United States*, 209 U. S. 56, at page 80, 28 S. Ct. 428, 435.

The language there quoted begs the entire question. To say that a regulation within the acknowledged power of Congress does not violate the no preference clause of the Constitution merely because it affects the ports of one state more than another is a truism that cannot be disputed. It is like saying a constitutional act, that is, one authorized by the whole instrument, is not made unconstitutional by a provision of the same instrument. In other words, a valid statute was attacked because certain ports were preferred. The Armour case is discussed at pages 44 and 45 of our main brief. That case is somewhat analogous to attacks that have been made on excise tax laws which it was claimed operated in violation of the uniformity requirement of the Constitution. The law itself as pointed out in our main brief must violate the Constitution in order to be invalid.

In this connection let me quote the sentence from the opinion in the Armour case which immediately precedes the quotation made by the Solicitor General. That sentence is as follows:

> "It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law."

This sentence points out the difference between the Reed Amendment and the statute under consideration in the Armour case. The Reed Amendment creates a preference by statutory law.

The cases cited in the quotation taken from the Armour case by the Solicitor General are not expressly noticed in our main brief, but come within the class of cases discussed in the first paragraph of the argument in that brief, page 44, and the last paragraph, page 45.

Reverting again to the Hill case, which the Solicitor General claims decided the Reed Amendment is constitutional, I sent to court officials of the District Court of the United States for the Southern District of West Virginia, at Charleston, West Virginia, and received a copy of the indictment and a copy of the opinion of the district judge and was informed that constituted the record, as all objections to the indictment were made orally. I have never been able to find that any objection was made in the District Court to the constitutionality of the act and the district judge in his opinion does not place his conclusions

on any constitutional grounds. No one appeared for Dan Hill in the Supreme Court. I cannot see how the constitutionality of the act was even in issue so as to now foreclose its presentation to this court. We are treating as settled questions the two issues decided in the Dan Hill case and seek no reversal or modification of the court's decision on the questions decided in that case.

I trust that this court will not misunderstand my attitude. I have nothing but most profound respect and admiration for decisions and dicta of this court. I would not raise this question were I not cognizant of the fact that this court out of great caution wants it understood that it has not passed on the constitutionality of a statute unless such action on its part was necessary. While I, of course, do not pretend to know the inner thoughts of the members of this court, I have always felt that the construction given the Reed Amendment was one arrived at as the majority of the court believed in accordance with the expressed intention of Congress, and a Justice might well have come to the conclusion on its construction reached in the Hill case and yet not have meant to decide that the act was constitutional. As pointed out in our main brief a court cannot write a new act merely to make a constitutional act out of one which is unconstitutional.

As Dan Hill was not in the Supreme Court by counsel, he could not have raised a constitutional question there. The District Court decided no such question and I presume the government raised no such question. Therefore, I conclude my position is in accordance with a late expression of this court found in the opinion in the case of *Blair v. U. S.*, 250 U. S. 273, 39 S. Ct. 468, at page 279, of the official edition, as follows:

> "Considerations of propriety, as well as long established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitled him to raise it."

The peculiar limitations of decisions under the act of March 2, 1907, under which the government brought here the Hill case are discussed in our main brief at pages 33-35.

Dan Hill was charged with bringing into West Virginia a quart of intoxicating liquor for his own use, a thing which the West Virginia statute at that time permitted him to do. It also appears that West Virginia after the decision of the Hill case by this court re-enacted the same provision (see page 104 of main brief). His alleged offense was minor and technical. His ability to employ counsel to present all phases of the constitutionality or construction of the Reed Amendment are not of record in this case, but it may be fair to assume that his circumstances and attitude were known by the prosecuting officials when the case was brought to this court, and they may be supposed to have reasonably anticipated a contest on his part of about the proportions it turned out to be. If the government really intended that decision of this court to settle all the vital and constitutional questions relating to the Reed Amendment, why did it select a case of a mere technical violation on the part of one who, it could reasonably have been anticipated, would not present such contentions because of lack of either interest or means?

It is hardly fair to this court or to those who do become really, earnestly and vitally interested in the con-

stitutionality of an act of Congress for the Solicitor General to attempt to prevent a consideration of this case on its merits on the claim that the question is foreclosed by a previous decision, in effect *ex parte* the government.

I quote from the opinion in the case of *Chicago, etc., Co. v. Wellman*, 143 U. S. 339, 12 S. Ct. 400, at page 345:

> "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals."

Again I want to assert that I am making no criticism of any one for presenting the Dan Hill case to this court, but I do not think it becomes one to claim that such a case, or the dicta in that decision, forever close the door of this court against one really, earnestly, and vitally interested in the question now claimed to have been decided in that case.

If the constitutionality of the Reed Amendment had been the issue, decision of which was sought in the Hill case, any indictment would have been sufficient for that decision, as the attack would have been on the law and not on the averments of the indictment. But the fact that the Hill indictment was drafted to charge the transportation of a quart of intoxicating liquors for personal use in terms

as permitted by the State statute, conclusively shows the purpose of the Hill case was to determine whether its peculiar facts were within the proper construction of the terms of the act. The Hill case, therefore, was plainly one of construction of the act, and not one intended by the Government or anyone else as a decision of the questions which the Solicitor General now claims were decided in that case. If the sole purpose of the Hill case was not to seek a construction of the Reed Amendment on the peculiar situation in West Virginia, but the purpose was to reach all phases of its constitutionality, again I ask, why did the Government select Dan Hill to contest these questions?

The result and greater part of what the opinion in the Hill case says is in perfect harmony with my contentions. Of course, a Congressional act does not depend upon the State law for its effectiveness. Congress has power to act independently of provisions of the State law, but this is not to say that Congress can pass laws applying only to states having certain other laws. The features of lack of uniformity and preferences were not considered in the Hill case. So far as I know, none of the objections now made to the Reed Amendment have been presented by counsel in any case. If some of them have been considered in the deliberations of the members of the court, would it be too much to ask a new consideration of them as applied to this case? My effort has been to sustain every decision of this court, and I want to co-operate with this court in analyzing and classifying the new specie of legislation typified in the Reed Amendment. As the majority of the court in the Hill case very likely would have felt compelled to give the same construction to the Reed Amendment which they did,

irrespective of any question of its constitutionality, as the construction and not the constitutionality of the statute was presented for decision, naturally conclusions on the construction must prevail over conclusions on the constitutionality. Whatever consideration was given the constitutionality of the act in the Hill case must have been incidental to the result, and undoubtedly the court was not called upon to finally determine that question. There is not even any suggestion in the Hill case that what was said there on the power of Congress was said in view of a consideration of the constitutional provisions relied upon in our briefs.

Being clearly convinced that the Reed Amendment is unconstitutional, being conscious that the attitude of this court is untiring and vigilant in its efforts to protect every constitutional right of its citizens, and feeling that this court desires research by counsel before deciding new questions, it is respectfully submitted that there is no color for this motion to dismiss and that motion and the motion to affirm should be denied. The basis of the writ of error in this case it is submitted is most substantial, and I believe that on reading the argument presented in our briefs the court will be convinced that counsel has spared no effort to be of service both to his clients and the court, in this, a new and difficult question. It is, therefore, further respectfully submitted that the writ of error has such substantial foundation that all of the errors assigned are entitled to be considered on their merits.

Respectfully submitted,

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